GEORGETOWN UNIVERSITY LAW LIBRARY
3 0700 01161725 4

PERCY ELLWOOD CORBETT

THE ROMAN LAW OF MARRIAGE

LADISLAS ORSY, S.J.
GEORGETOWN UNIVERSITY

£20-90

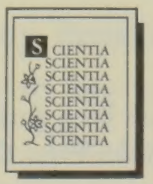
PERCY ELLWOOD CORBETT

THE ROMAN LAW OF MARRIAGE

PERCY ELLWOOD CORBETT

THE ROMAN LAW OF MARRIAGE

SECOND REPRINT OF THE EDITION OXFORD 1930



1979

SCIENTIA VERLAG AALEN

This reprint has been authorized by the
Clarendon Press Oxford
ISBN 3.511.09102.0.
Printed by fotokop wilhelm weihert KG,
Kleyerstraße 12, Darmstadt
Printed in Germany

PREFACE

THIS book is designed to provide English-speaking students with a concise general statement of the Roman law pertaining to marriage. I have not come upon any book in English covering the subject, nor do I know any monograph of quite the same scope in the more accessible of the other European languages.

My authorities have been, in the first place, the Roman legal texts. But these require supplementing from literary authors, inscriptions, papyri, and all the other sources of information about Rome and its institutions. For many juristic and non-juristic references I am indebted to a number of writers, mostly French, German, and Italian, whose names will be found cited here and there in the foot-notes. My work will not have been in vain if its only result is to make the researches of these scholars into particular aspects of marriage law more familiar to English readers.

I owe special thanks to Professor de Zulueta, whose penetrating criticism and detailed notes on bibliography have saved me in many instances from ignoring important work relevant to my subject and substantial objections to my views. The observations of Professor Buckland and of Professor Max Radin on particular points of exegesis have also been stimulating and helpful.

In the section having to do with *matrimonium juris*

gentium, and in the chapter on divorce, portions of two articles published in the *Law Quarterly Review* are reprinted with the kind permission of the Editor.

P. E. C.

MCGILL UNIVERSITY, MONTREAL.

June 1st, 1929.

CONTENTS

BIBLIOGRAPHY ix

PART I. FORMS AND CONDITIONS

I. BETROTHAL 1

II. CAPACITY AND CONDITIONS OF MARRIAGE 24

III. THE FORMS OF MARRIAGE 68

PART II. THE EFFECTS OF MARRIAGE

IV. STATUS, CAPACITY, AND PROPRIETARY RELATIONS OF CONSORTS 107

V. MATRIMONIAL RIGHTS AND DUTIES . . . 122

PART III. MARRIAGE CONTRACTS

VI. DOWRY 147

VII. DONATIO ANTE NUPTIAS 205

PART IV. DISSOLUTION AND REMARRIAGE

VIII. MODES OF DISSOLUTION OTHER THAN DIVORCE 211

IX. DIVORCE 218

X. REMARRIAGE 249

INDEX 253

BIBLIOGRAPHY

I. SOURCES

G. . . . . Gaius, *Institutiones*, Kübler, Teubner, 1928.

Paul, *Sent.* . . . Paul, *Sententiae*, in Girard, *Textes de Droit Romain*, 4th ed., Paris, 1913, cited as Girard, *Textes*.

Ulpian, *Reg.* . . . Ulpian, *Regulae*. The text used is Fr. Schulz, *Die Epitome Ulpiani*, Bonn, 1926, though I have retained the more familiar form of citation.

F. V. . . . . *Fragmenta Vaticana* in Girard, *Textes*.

Coll. . . . . *Mosaicarum et Romanarum Legum Collatio*, in Girard, *Textes*.

Inst. . . . . Justinian, *Institutiones*, in Girard, *Textes*.

C. Th. . . . . Theodosius, *Libri XVI cum Constitutionibus Sirmondianis et Leges Novellae ad Theodosianum Pertinentes*, Mommsen and Meyer, Berlin, 1905.

D. . . . . Justinian, *Digesta*, Mommsen and Krüger, 14th ed., Berlin, 1922.

C. . . . . Justinian, *Codex*, Krüger, 9th ed., Berlin, 1925.

Nov. . . . . Justinian, *Novellae*, Schöll and Kroll, 4th ed., Berlin, 1912.

Theophilus . . . Theophilus, *Institutionum Graeca Paraphrasis*, Ferrini, Berlin, 1884.

C. I. L. . . . *Corpus Inscriptionum Latinarum*.

P. Oxy. . . . *The Oxyrhynchus Papyri*, Grenfell and Hunt, Oxford.

Aulus Gellius . . Aulus Gellius, *Noctes Atticae*, Hertz, Berlin, 1883–5.

Cicero, *de Divin.* . . Cicero, *de Divinatione*
Cicero, *de Oratore* . . Cicero, *de Oratore*
Cicero, *de rep.* . . Cicero, *de Republica*
Cicero, *pro Caec.* . . Cicero, *pro Caecina*
Cicero, *pro Sest.* . . Cicero, *pro Sestio*

} *M. Tullii Ciceronis Scripta quae manserunt omnia*, Müller, Teubner, 1891–1900.

Cicero, *Phil.*	Cicero, *In M. Antonium Philippicae*	*M. Tullii Ciceronis Scripta quae manserunt omnia*, Müller, Teubner, 1891–1900.
Cicero, *Top.*	Cicero, *Topica*	
Cicero, *Ad Att.*	Cicero, *Epistulae ad Atticum*	
Cicero, *Ad Fam.*	Cicero, *Epistulae ad Familiares*, Purser, Oxford, Clarendon Press.	
Dio Cassius	*Dio's Roman History*, Loeb, 1914.	
Dionysius, *Antiq.*	Dionysius of Halicarnassus, *Antiquitates Romanae*, in *Opera Omnia*, Leipzig, 1829.	
Livy	Titus Livius, *Ab Urbe Condita Libri*, Weissenborn, Teubner, 1899–1901.	
Martial, *Ep.*	*Martialis Epigrammata*, Gilbert, Teubner, 1901.	
Plautus, *Amphitryo*, &c.	Plautus, *Comoediae*, Götz and Schöll, Teubner, 1898–1901.	
Pliny, *H. N.*	C. Plinius Secundus, *Historiae Naturalis Libri XXXVII*, Sillig, Hamburg and Gotha, 1851.	
Plutarch, *Q. R.*	Plutarch, *Quaestiones Romanae* in *Varia Scripta*, Tauchnitz, Leipzig, 1829.	
Plutarch, *Rom.*, &c.	Plutarch, *Romulus*, &c., Loeb, 1914.	
Quintilian, *Inst.*	Quintilian, *Institutio Oratoria*, Halm, Teubner, 1868–9.	
Seneca, *Controv.*	M. Annaeus Seneca, *Controversiarum libri decem*, Kiessling, Teubner, 1872.	
Servius, *in Aen.*	*Servii Grammatici in Vergilii Carmina Commentarii*, Thilo, Teubner, 1878–87.	
Servius, *in Georg.*		
Suetonius, *Aug.*	Suetonius, *Augustus*, in *C. Suetonii Tranquilli quae supersunt omnia*, Roth, Teubner, 1902.	
Tacitus, *Ann.*	Tacitus, *Annales*, Halm, Teubner, 1901.	
Tacitus, *Hist.*	Tacitus, *Historiae*, Halm, Teubner, 1901.	
Terence, *Andria*, *Hec.*, &c.	Terence, *Comoediae*, Fleckeisen, Teubner, 1898.	
Val. Max.	Valerius Maximus, *Facta et dicta memorabilia*, Kempf, Teubner, 1888.	
Varro, De L. L.	Varro, *De Lingua Latina*, Spengel, Berlin. 1885.	

II. EDITIONS, COMMENTARIES, AND PERIODICALS CITED UNDER ABBREVIATED TITLES

Bonfante, *Corso*	Bonfante, *Corso di Diritto Romano*, Rome, 1925.
Brini, *Matrimonio*	Brini, *Matrimonio e Divorzio nel Diritto Romano*, Bologna, 1887–9.
Bruns, *Fontes*	*Fontes Juris Romani Antiqui*, 7th ed. Tübingen, 1909.
Buckland, *Textbook*	Buckland, *A Textbook of Roman Law from Augustus to Justinian*, Cambridge, 1921.
Cuq, *Institutions juridiques*	Cuq, *Manuel des Institutions juridiques des romains*, 2nd. ed., Paris, 1928.
Czyhlarz, *Dotalrecht*	Czyhlarz, *Das römische Dotalrecht*, Giessen, 1870.
Esmein, *Mélanges*	Esmein, *Mélanges d'histoire du droit et de critique; droit romain*, Paris, 1886.
Girard, *Manuel*	Girard, *Manuel Élémentaire de Droit Romain*, 6th ed., Paris, 1918.
Jörs, *Verhältniss* &c.	Jörs, *Ueber das Verhältnis der lex Julia de M. O. zur lex Papia Poppaea*, Bonn, 1882.
Jörs, *Ehegesetze*	Jörs, *Die Ehegesetze des Augustus* in *Festschrift für Mommsen*, Marburg, 1893.
Jörs, *Römisches Privatrecht*	Jörs, *Geschichte und System des Römischen Privatrechts*, Berlin, 1927.
Karlowa, *Röm. Rg.*	Karlowa, *Römische Rechtsgeschichte*, Leipzig, 1885–1901.
Krüger, Mommsen, and Studemund, *Collectio*	Krüger, Mommsen, Studemund, *Collectio Librorum Juris Antejustiniani.*
Lenel, *E. P.*	Lenel, *Das Edictum Perpetuum*, 3rd ed., Leipzig, 1927.
Levy, *Ehescheidung*	Levy, *Der Hergang der römischen Ehescheidung*, Weimar, 1925.
Levy, *Verschollenheit*	Levy, *Verschollenheit und Ehe in antiken Rechten* in *Gedächtnisschrift fur Emil Seckel*, Berlin, 1927.
Marquardt, *Privatleben*	Marquardt, *Privatleben der Römer*, Leipzig, 1886.
Meyer, *Konkubinat*	Paul Meyer, *Der Römische Konkubinat*, Leipzig, 1895.

Mitteis, *Reichsrecht*	Mitteis, *Reichsrecht und Volksrecht*, Leipzig, 1891.
Mitteis, *Privatrecht*	Mitteis, *Römisches Privatrecht*, Leipzig, 1908.
Mitteis-Wilcken, *Papyruskunde*	Mitteis-Wilcken, *Grundzüge und Chrestomathie der Papyruskunde*, Teubner, 1912.
Mommsen, *Staatsrecht*	Mommsen, *Römishes Staatsrecht* in Marquardt and Mommsen, *Handbuch der römischen Alterthümer*, Leipzig, 1887–8.
Mommsen, *Strafrecht*	Mommsen, *Römishes Strafrecht*, Leipzig, 1899.
Pauly-Wissowa	Pauly-Wissowa, *Realencyclopädie der classischen Alterthumswissenschaft.*
Puchta, *Institutionen*	Puchta, *Cursus der Institutionen*, 10th ed.; Leipzig, 1893.
Rossbach, *Römische Ehe*	Rossbach, *Untersuchungen über die römische Ehe*, Stuttgart, 1853.
Solazzi, *Minore Età*	Solazzi, *La Minore Età nel Diritto Romano*, Rome, 1912.
Solazzi, *Restituzione della Dote*	Solazzi, *La Restituzione della Dote nel Diritto Romano*, Città di Castello, 1899.
Bull.	*Bulletino del Istituto di Diritto romano.*
N. R. H.	*Nouvelle Revue Historique de Droit français et étranger.*
R. H.	*Revue Historique de Droit français et étranger.*
Z. R. G.	*Zeitschrift für Rechtsgeschichte.*
Z. S. St.	*Zeitschrift der Savigny Stiftung, Romanistische Abteilung.*
Z. V. R.	*Zeitschrift für vergleichende Rechtswissenschaft.*

PART I

FORMS AND CONDITIONS

CHAPTER I

BETROTHAL

AMONG the Romans, as elsewhere, marriage was usually preceded by a betrothal concluded with the consent of those persons whose consent was also essential to marriage. When 'marriage by consideration'[1] was the general rule, in other words, when the woman was actually sold to the man—which was probably at one time the case among the Indo-Germanic race as a whole, as also among the Semitic peoples[2]—this would be the point at which the bargain was made. There may indeed have been a stage when the sale of the woman, followed by her delivery to the purchaser, constituted the sole formality of marriage, where accordingly betrothal and marriage were combined in one transaction.[3] But real sale appears to have survived the introduction of religious ceremonies and to have been then regarded merely as the first step in the acquisition of a woman as wife.[4]

1. Nature and conditions of validity.

As it appears in Roman law, betrothal is at any rate the point at which the match-making negotiations between the parties themselves or their *patresfamilias*

[1] Westermarck, *History of Human Marriage*, ch. 23; Westrup, Z. V. R. 42, 1927, pp. 47–145.

[2] See for example Code of Hammurabi, 159 and *passim*.

[3] Cf. Koschaker, Z. S. St. 33, 1912, p. 387, on the development from the cash sale constituting marriage to separate betrothal and marriage.

[4] Cf. Rossbach, *Römische Ehe*, p. 237.

or guardians came to a head. In substance and perhaps also in form there was a mutual promise of marriage, a promise the breach of which entailed liabilities varying from time to time in the history of Roman law.

As far as the age of the future consorts is concerned, the sole requirement of betrothal was that they should be no longer *infantes* or *infantiae proximi*, that is to say, that they should be old enough to speak with intelligence of what they said, which, in the law of Justinian, they were presumed to be able to do on completion of their seventh year.[1] The boy might accordingly be affianced seven years, the girl five years, before a valid marriage could be celebrated.

Neither in the sixth century A. D. nor in the classical period could a father betroth his son against his will.[2] This was true of the son *in potestate*; it was true *a fortiori* of the emancipated son. The case of the daughter *in potestate* is much less clear. It has been argued—if not conclusively, certainly with great force—that until late imperial times, she could be promised and given in marriage against her express will. This argument is based partly upon the expressions constantly used in the texts to describe the matrimonial arrangement made by fathers for their daughters, *in matrimonium collocare*, *dare* or *tradere*, contrasted with the *uxorem ducere pati* used of sons; partly upon the fact that a *paterfamilias* could break off a *filia*'s engage-

[1] D. 23, 1, 14. The end of the passage—'si modo . . . annis'—is probably an interpolation. See below, p. 4, n. 1, and compare Mommsen and Krueger's edition of the Digest (1922) and Girard, *Manuel*, p. 203, n. 4.

[2] D. 23, 1, 7, 1; 13. 23, 2, 2. C. 5, 4, 12; 14. Ulpian, *Reg.* 5, 2. The question of the son's consent in early law is dealt with below, pp. 53 et seq.

ment (D. 23, 1, 10) and, for a long time, even her marriage,[1] without reference to her desires. In its bearing upon the *consensus* needed for the celebration of marriage itself, we shall examine this doctrine later;[2] for the present we shall limit ourselves to the question of its validity in regard to betrothal. It involves the assumption that certain excerpts in the Digest, such as D. 23, 1, 11. 23, 2, 2, as well as Ulpian, *Reg.* 5, 2, which call for the consent of *filia*, have been altered.[3] But even on the face of the texts it is doubtful how much importance was in any period attached to that consent. C. Th. 3, 5, 11 (A.D. 380) declares that 'pater semet ipsum obliget' when he promises a daughter's hand and accepts *arra*, whereas it is *sponsa* herself who is liable when the promise has been made on her behalf by tutor, curator, or relative. Solazzi has some reason for inferring from this that her consent was irrelevant in the first case but essential in the second. Moreover, in spite of the statement in D. 23, 1, 11 that *filia* must assent, we are told in the fragment immediately following that she is regarded as doing so if she does not protest, and that she may protest only if her father's choice has fallen upon one 'indignum moribus vel turpem'.[4] The son appears to have fared somewhat better, for though Paul's language in D. 23, 1, 13—'Filiofamilias dissentiente sponsalia nomine ejus fieri non possunt'—would indicate that it was absence of dissent

[1] See below, pp. 122–4 and pp. 239–41. [2] See below, pp. 53 et seq.

[3] Solazzi, *In Tema di Divorzio*, Bull. 34, 1925, pp. 1–28.

[4] Gradenwitz, *Interpolationen*, 102, regards this phrase as an interpolation, but Krüeger retains it as part of Ulpian's text. If the tendency of Justinian's legislation was to increase *filia's* discretion in the choice of a husband, it looks rather like part of the original left standing by an oversight of the compilers.

rather than express consent that was looked for, yet there is at least nothing to show that he had not an unlimited liberty of dissent.

If it be true that the *filiafamilias* was not necessarily consulted, it becomes doubtful whether she could not be betrothed in infancy. Moreover, if all that was demanded in the son's case was absence of dissent, a match might be arranged at any age for him as well, subject to cancellation when he became able to protest. This reasoning suggests that the text of Modestinus cited in D. 23, 1, 14 stopped with the assertion that betrothal could be concluded 'a primordio aetatis' and that all the rest of the passage was added by the compilers.[1] The rule as to age then becomes entirely post-classical.

There is considerable evidence, then, that the *paterfamilias* had it in his power to play a despotic part in the betrothal of a daughter. But it is clear from the texts that both she and the *filius* were often allowed to take the initiative in their matrimonial affairs. When they did so, those persons whose assent was necessary for valid marriage must consent to the betrothal. *Filiusfamilias* must have the approval of his *paterfamilias* and, if his father is in the same *potestas*, of his father, while for the *filia* the sole approval of the ascendant having *patria potestas* suffices.[2] In D. 23, 1, 7, 1 Paul cites the opinion of Julian that a father should be deemed to consent to his daughter's engagement if he does not clearly object. From this it is sometimes argued *a contrario* that a *filius* must have express approval; but the inference is far from certain.[3] However this may be,

[1] Cf. Solazzi, op. cit., p. 5.

[2] D. 23, 2, 16, 1 and see below, p. 57.

[3] See below, pp. 57 et seq.

it seems obvious that Paul is here thinking only of the contemporary informal agreement to marry. So long as the engagement took the form of stipulation, it must have been concluded, given the legal incapacity of *filiafamilias*, with her *paterfamilias*, and the act involved his positive and clearly expressed assent.

With regard to the functions of tutors in connexion with the betrothal of their wards, the sources are far from satisfactory. The general rule that the same consents were required as for marriage covers fairly well the case of the female ward,[1] but is no guide in regard to *pupillus*. There was no question of tutor's consent to the marriage of a young man, because, by the time he became capable of marriage, that is to say, at fourteen, he had ceased to have a tutor. But while still *pupillus*, the boy, so long at least as the mode of betrothal was the *stipulatio*, in all probability needed *auctoritas*. The question is indeed complicated by the existing doubt as to whether *sponsalia* consisted of a unilateral or of reciprocal stipulations.[2] If the youth was stipulator only and not also promissor, it may be argued that the contract being unilateral and formally at least for his benefit he could act alone. But in substance, if not in form, he was undertaking to marry his *sponsa*, a proceeding at least as risky as the acceptance of an inheritance, an act which, however rich the succession, he could not perform without *auctoritas*.[3]

The stipulation constituting betrothal was long a transaction between the future husband or his *paterfamilias* and the father or guardian of *sponsa*.[4] Formally

[1] D. 23, 1, 7, 1.
[2] See below, pp. 8 et seq.
[3] Gaius in D. 36, 8, 9, 3–4. Inst. 1, 21, 1.
[4] Cf. Aulus Gellius, 4, 4.

then, the party on the girl's side was not the girl herself, but her *paterfamilias* or tutor. Her own participation was limited to consent at most, and this may not have been necessary so long as guardianship continued to confer real power designed to protect the guardian's rather than the ward's interests. It is inconceivable that the girl under twelve could in this period betroth herself or be betrothed by a relative without her tutor's concurrence. On general principles it is probably safe also to assume that his *auctoritas* would be required after the ward had passed her twelfth birthday. We know that he must participate in any marriage with *manus* which she might contract;[1] though, if we may draw any inference from an incident at Ardea just before its colonization by Rome,[2] it is possible that where a guardian objected to a match arranged by relatives of his ward his objection might be overruled by a magistrate.

When the *stipulatio* was superseded in practice by *nudus consensus*, the tutor might still transact this business for his female ward, though now only with her consent.[3] But the girl now had it in her power to proceed alone, provided of course she had reached an age to understand what she was doing. We know from

[1] Cicero, *pro Flacco*, 34, 84. Gaius, 1, 195a, and see below, p. 60.

[2] Livy, 4, 9, and see below, p. 61.

[3] D. 23, 1, 4; 6. The deletion of 'nisi forte . . . facta sunt' as an interpolation (Eisele, Z. S. St. 13, 152) does not alter the sense of D. 23, 1, 6, this final clause being no more than an expansion of the preceding 'solos'. C. Th. 3, 5, 11 shows that in the fourth century A. D. tutors, curators, and relatives often arranged the girl's marriage just as they do in some countries to-day. But the constitution suggests also, as I have pointed out on p. 3. above, that when they did so the girl must consent, at least after she had reached the age of twelve, whereas a *paterfamilias* could act independently of her desires.

the texts dealing with the father's ratification of engagements entered into by his children, as well as from Ulpian's express testimony in D. 3, 2, 13, 1, that parents often allowed sons and daughters to arrange their own matches, subject to a right of veto. *A fortiori* the tutor in the classical law might leave such matters to the ward and her relatives. Moreover, we have for this period a rescript of Severus and Caracalla quoted by Paul in D. 23, 2, 20 to the effect that a ward could marry at her discretion.[1] This refers of course to free marriage, but warrants the general conclusion that *auctoritas* was no longer essential to betrothal. At the most the tutor might appeal on reasonable grounds to a magistrate to prevent the union.[2]

There could be no valid betrothal with an insane person, but a supervening insanity did not annul *sponsalia* concluded while of sound mind, any more than it annulled marriage.[3] It must, on the other hand, have been regarded as a just reason exempting from the liabilities for breaking an engagement,[4] though only incurable or violent insanity justified divorce.[5] After what has been said of consent, it is scarcely possible to ascribe the incapacity of the lunatic for betrothal in any general way to the absence of legal will, though it is precisely on this ground that Paul in D. 23, 2, 16, 2 bases his statement that insanity is a bar to marriage. The abnormality of the sufferer and his resulting unfitness for matrimonial relations would doubtless, however, constitute sufficient reason for the rule.

[1] See below, p. 60 and n. 3.

[2] See below, p. 62.

[3] D. 23, 1, 8. 23, 2, 16, 2. 24, 2, 4.

[4] A mere change of religion or sect was regarded as just cause under Leo and Anthemius, C. 5, 1, 5, 3.

[5] D. 24, 3, 22, 7.

Legal impediments to intermarriage logically and naturally prevented betrothal.[1] Thus there could be no valid engagement between persons within the prohibited degrees of relationship; between senatorials and freedmen or freedwomen—at least from the Oratio of Marcus and Commodus until this prohibition was repealed by Justinian;[2] between tutors, curators, their sons or grandsons and their female wards.[3] The case of the public official arranging a future marriage with a woman in his province is a partial exception—the arrangement is not prohibited, though the marriage may not take place during his term of office in the province.[4] But, though the betrothal is not prohibited, the woman who refuses to proceed with the marriage after the term of office has been completed is exempt from the usual penalties for breach of *sponsalia*, at least after the constitution enacted in A. D. 380 by Gratian, Valentinian and Theodosius.[5] She has at most to return the *arra sponsalicia*.[6]

2. Form and legal consequences.

In D. 23, 1, 2, Ulpian informs us that it was a custom among the ancient Romans to secure their future wives by stipulation. Nothing is said of a promise to marry given by the man, and from this text, combined with a passage of Varro, *de Lingua Latina*, 6, 69–73, it is sometimes inferred that betrothal consisted, not of

[1] D. 23, 2, 60, 5.

[2] D. 23, 1, 16. 23, 2, 44; and see below, pp. 34–9. Repeal of prohibition C. 5, 4, 23. 5, 4, 29.

[3] D. 23, 1, 15. 23, 2, 60, 5; 64, 2. C. 5, 6, 5.

[4] D. 23, 2, 38, pr.

[5] C. Th. 3, 6, 1. C. 5, 2, 1.

[6] D. 23, 2, 38, pr. 'Ita scilicet . . . acceperat' is held by Riccobono (*Prospectus*, 17. Cf. Mitteis, *Reichsrecht*, p. 268, Koschaker, op. cit., p. 391, and Cornil in Z. S. St. 48, 1928, pp. 61–2) and generally considered to be an interpolation, but at least proves the law to be so in the time of Justinian. C. 5, 2, 1 allows her to keep *extrinsecus data pignora*, which presumably do not include *arra*.

mutual stipulations, but of a single stipulations in which the woman's representatives were promissors. Like Ulpian, Varro does indeed omit all mention of a promise to marry on the part of the man. He regards the term *sponsus*, describing the future husband, as sufficiently justified from the etymological point of view by the fact that he was the person to whom the maiden was *desponsa* by parent or guardian. The opponents of the single-stipulation theory are not content with Varro's statement. They argue from the term 'sponsus', that there must have been a second stipulation in which the man was *reus promittendi*.[1] In so doing they have with them Aulus Gellius who, in *Att. Noct.* 4, 4, states that the man promised to marry and was on that account (*qui spoponderat ducturum*) 'sponsus'. This would be conclusive, as against the mere omission in Varro and Ulpian, if it were not that Gellius is speaking of *sponsalia* in Latium where, according to Servius Sulpicius and Neratius, whom he cites, betrothal took the form of actionable double stipulations until the grant of citizenship by the *lex Julia* of 90 B. C.

Servius Sulpicius, a contemporary of Cicero, wrote at a time when the grant of citizenship to all Italy was still recent. Assuming that his works were still extant in the second century A. D., the citation in Gellius is satisfactory evidence that up to 90 B. C., the Latin *sponsalia* consisted of two actionable stipulations. Are we, assuming with Karlowa an original identity of Latin and Roman law, to conclude that the double stipulation had been the practice at Rome? If not, then the Latin *sponsalia* were a peculiar institution developed by that people after Rome's establishment as

[1] e. g., Karlowa, *Röm. Rg.*, 2, 178.

a distinct State, rather than a survival from a common stock.

The question cannot be studied apart from the effect of *sponsalia*. In Latium, the engagement had been actionable on either side. If the unilateral stipulation alone was practised at Rome, then a breach of promise on the woman's part may indeed have given cause for action, but there was, formally, no promise on which to ground an action against the man. This, says Girard,[1] accords perfectly with the fact that the marriage with *manus*—that is to say, in early times every marriage—was, with the exception of *confarreatio*, dissoluble at discretion by the husband, while the woman *in manu* could not divorce. Indissolubility for the engagement, discretion as to the continuance of the actual marriage—a remarkable incongruity![2] But, as Karlowa points out,[3] freedom of divorce and the free marriage are probably concomitant developments, and it may well have been precisely the increasing frequency of the marriage without *manus* which led to the refusal of an action to enforce *sponsalia* on either side and to that disuse of the formal promise indicated by Ulpian in D. 23, 1, 2 and 4.[4] Moreover the incongruity of free divorce for the man and the existence of an action against him for breach of promise, if they were coincident in time, is by no means inexplicable. In the first place, the man's undertaking, as it appears in Gellius's description of the Latin betrothal, is simply to take the woman as wife

[1] *Manuel*, p. 152, n. 3.

[2] Cf. Ihering, *Geist des römischen Rechts*, 2, 211.

[3] Op. cit., 2, 177–8.

[4] Bonfante, *Corso*, 1, pp. 255–6, also connects the disappearance of the action for breach of promise with the increasing frequency of free marriage and the disuse of the stipulation.

(*in domum deducere*) not to keep her as wife. Further, before their marriage the parties were, in relation to each other, on a footing of equality, which was superseded, with the *conventio in manum*, by one of subordination for the woman. The man's power to divorce at discretion is not then sufficient evidence of his freedom to break an engagement with a person in a position of legal equality.

A consideration of the primitive transaction which probably constituted the first betrothal, namely the agreement with a *paterfamilias* wherein he undertook to hand over his daughter at a specified price, does indeed tend to confirm the view that the man's promise to marry was a later development. In form and substance, at this early stage, his promise would appear to have been a promise to pay the price, if it was not paid on conclusion of the agreement. The idea of a difference in the position of wife and children on the one hand and of slaves on the other, of property in the latter and *manus* or *potestas* over the former, is a product of advancing civilization. Only with this progress would it be recognized as desirable to designate in the transaction between the future husband and the woman's *paterfamilias* the purpose for which she was being purchased. Out of this designation may have developed the man's specific undertaking to marry the object of purchase. But this differentiation of wife-purchase from ordinary sale took place considerably before the division of the Latins into separate States; indeed the reduction of sale for marriage purposes to a mere symbol must have long preceded that separation. The development, in other words, was common to the Latin people and probably took a common form. This leads to the

conclusion that the Latin *sponsalia* described by Gellius on the authority of Servius Sulpicius were practised by that section of the Latins which became Rome.

The accounts given by Varro and Ulpian in the passages already cited do not strictly exclude this conclusion. They present the future husband as the active party. His purpose is marriage, his immediate object to secure a particular woman. He employs the stipulation. In substance he was undertaking to marry the woman. It would be contrary to the principles of early formalism to base an action upon this tacit agreement, but even the express promise might easily escape mention in what was in the case of Varro an etymological discussion of *spondeo* and its derivatives, and in the case of Ulpian, a succinct contrast of early formality with present indifference to form.

The object of this reasoning has been to support the opinion that if the Roman betrothal was ever actionable at all, a point which most of the authorities are ready enough to concede,[1] it was bilaterally actionable. The

[1] See Voigt, *Jus Naturale*, 2, 234, note 246. Voigt himself opposes this view, but his disposal of Varro's evidence is far from satisfactory. For one thing, he does not consider the end of the passage. Varro not only affirms—'non enim si volebat, dabat, quod sponsu erat alligatus,—quod tum et praetorium jus ad legem et censorium judicium ad aequum existimabatur'—the last part of which is admittedly ambiguous; but goes on to point out that the promise of a daughter in marriage was not actionable if made in jest or as part of a dramatic representation. In the face of this, how can it be maintained that Varro did not believe and was not asserting that the promise had once been a cause of action at least for the *sponsus* in Roman law? Cornil, expressing in Z. S. St. 48, 1928, pp. 55–7 an opinion contrary to that which he had advanced in 1912, *Mélanges P. F. Girard*, 1, pp. 237–40, now holds that the *sponsio* imposed a religious obligation upon the girl's father or tutor, while the ring given by *sponsus* subjected him to a magical bond. He denies that there ever was any civil obligation. Apart from the other evidence, I

betrothal was an agreement between two families equal in the eyes of the law; it would have been an unreasonable anomaly to make that agreement the ground of an action for one and not for the other. The view that bilateral obligation was a Latin survival from a common institution, early relaxed at Rome in consequence of the more rapid Roman development towards a freer family organization, rather than a peculiarly Latin invention, is in conformity with the general course of social progress in the peninsula.

Varro, writing in the first century B. C., speaks of the stipulation in *sponsalia* as an obsolete institution. The present tense, into which he breaks towards the end of his discussion, is obviously a historic present. His contemporary, Servius Sulpicius, appears to have noticed the recently abolished Latin practice as a remarkable survival of a usage long since abandoned in Rome. Ulpian in D. 23, 1, 2, derives '*sponsalia*' from the *ancient* custom of stipulating a wife in the form *spondesne? Spondeo*. When did the use of the stipulation in this connexion cease? If we are to take Plautus as a serious witness of contemporary Roman institutions—and his value is admittedly diminished by his constant recourse to Greek sources—there was still in his time a difference between the informal negotiations leading up to betrothal and the betrothal itself, which was definitively concluded by a *sponsio*. This Karlowa[1]

agree with Bonfante, *Corso*, 1, p. 226, that this opinion is incompatible with any reasonable interpretation of the passage just cited from Varro. Westrup discusses the problem at some length in Z. V. R. 42, 1927, pp. 64–7, and reaches the conclusion that the early Roman like the Latin *sponsalia* involved mutual and actionable obligations.

[1] *Röm. Rg.*, 2, 178. The references to Plautus are to *Poenulus*, V, 3, 37 et seq., and *Trinummus* II, 4, 99 et seq.

uses as proof that betrothal had formerly been actionable—otherwise why the distinction? Apparently, then, he holds that the *stipulatio* continued to be used as the form after the betrothal had ceased to be actionable,[1] a change which he assigns roughly to the period of the Punic Wars.

There is no trace of any law prohibiting the grant of the *actio ex sponsu* for breach of promise, nor have we any evidence to show that the praetorian edict contained an announcement that the action would be refused. Yet the serious step of depriving the formal stipulation, when used as a promise of marriage, of direct legal sanction would surely require legislative or at least magisterial enactment. The absence of any such enactment points to a different course of development, to the substitution of a formless pact for the stipulation. The mere pact is *ipso jure* unactionable, though it may entail legal consequences of another order. What probably happened was that as the free marriage developed and its liberty of divorce extended to the *manus* marriage, the legally binding engagement fell into disuse. The engagement may for some time have continued to give grounds of action when in fact the stipulation had been resorted to. But then another element entered. Freedom to break off an engagement or a marriage came to be regarded as a matter of public interest against which private convention, even in strict form, could not prevail. Here was a general legal principle upon which to base refusal of the action even in those cases where the stipulation had been employed.

[1] Voigt, loc. cit., also thinks that the *stipulatio* was used not merely for strict and binding legal purposes, but also for ordinary business involving no direct legal consequences.

An attempt was made to establish an indirect reinforcement of the promise to marry by the stipulation of a penalty if the marriage should not be celebrated. This, being a mere promise of a payment subject to a condition, namely that a specified marriage did not take place, seems to have evaded the general principle for a very long time, for Paul in his *Responsa*, D. 45, 1, 134, pr., treats the effect of such stipulations as a serious question. His statement is that they are 'non secundum bonos mores' and that the defendant may plead *dolus*, 'quia inhonestum visum est vinculo poenae matrimonia obstringi sive futura sive jam contracta.' The introduction of *arra sponsalicia* into Roman law, which is exactly such a penalty, had to wait for the change in opinion regarding marriage and divorce that followed the official recognition of Christianity.

While there was an action, its object could only have been pecuniary compensation. Specific performance appears only in the latest development of Roman procedure and could not then be exacted on a promise to marry. Gellius[1] shows the Latin judge inquiring first whether good cause existed for breaking off the match and then, if there was no good cause, estimating the damage and condemning the defendant to pay the pecuniary equivalent. The action was 'ex sponsu' for an *incertum*. Varro[2] speaks of praetorian and censorial intervention to preserve the sanctity of betrothal in language which has lent itself to various interpretations. The inference that there was a formulary action for breach of promise has against it the modern view which places the *lex Aebutia*, introducing the formulary procedure, as late as 150 B.C. The tone of our texts

[1] 4, 4. [2] *De L. L.* 6, 71.

points to the disappearance of the action at a date considerably earlier than this. Karlowa's suggestion[1] that Varro means simply that there was a legal obligation coming under the ordinary civil jurisdiction of the praetor, as well as a moral obligation with a censorial sanction, has more to commend it.

The substitution of the informal agreement and the consequent refusal of an action did not deprive *sponsalia* of all legal effect. The consequences recognized at various times were as follows:

(*a*) Two simultaneous engagements or marriage with one person in violation of an engagement to another entailed praetorian *infamia* for the responsible parties.[2]

(*b*) Betrothal set up a sort of affinity, sufficient to render illegal the marriage of one party to the engagement with the parent or child of the other. Thus, according to Ulpian in D. 23, 2, 12, 1–2, a son may not marry his father's *sponsa* nor a father his son's, and Paul in D. 23, 2, 14, 4, reports a decision of Augustus against marriage with the mother of the *sponsa*.

(*c*) A rescript of Severus and Caracalla declares that a *sponsus* may prosecute his *sponsa* for infidelity. If proved guilty she is liable to the pains and penalties of the *lex Julia de Adulteriis*.[3]

(*d*) Gifts and legacies from *sponsus* to *sponsa* and vice versa were exempt from the limitations imposed by the *lex Cincia* and *lex Furia Testamentaria*.[4]

(*e*) Betrothal exempts *sponsus* from the penalties of celibacy under the *lex Julia*, provided *sponsa* is at least ten years old. The minimum age was set to prevent

[1] *Röm. Rg.*, 2, 176.

[2] D. 3, 2, 1; 13, 1–4.

[3] D. 48, 5, 14, 3 and 8.

[4] F. V. 302. But see below, p. 118 and n. 2.

long evasion of the *lex* by engagement to a child just out of infancy.[1]

(*f*) A *sponsus* could not be compelled to give evidence against his fiancée's father, nor the father against *sponsus*—an extensive interpretation of the *lex Julia judiciorum publicorum*.[2]

(*g*) Murder of a *sponsus* or *sponsa* or of the parent or child of *sponsus* or *sponsa* was regarded as parricide within the meaning of the *lex Pompeia*.[3]

3. Form of denunciation of *sponsalia*.

No special form was needed to constitute valid betrothal in the classical period; any signification of consent was sufficient. 'Sufficit nudus consensus', says Ulpian in D. 23, 1, 4. It is in regard to these informal engagements, doubtless, that the *paterfamilias* who failed to object was held to consent.[4] The agreement might or might not be recorded in writing. It might be concluded by the betrothed in each other's presence, by messenger or letter, or by proxy.[5] There was an approved, though not compulsory, form for breaking off an engagement so as to terminate the legal consequences detailed above. Gaius writes, 'In sponsalibus quoque discutiendis placuit renuntiationem intervenire opertere; in qua re haec verba probata sunt: condicione tua non utor'.[6] He goes on to say that when the parties were not in the same place the renunciation might be addressed to the *paterfamilias* or to a child *in potestate* of the party for whom it was intended. That some communication was necessary is confirmed by C. 5, 17, 2 where Valerian and Gallienus (A. D. 259) allow a *sponsa* to marry another, her *sponsa* having been absent for

[1] Suetonius, *Aug.* 34, Dio Cassius, 54, 16.
[2] D. 22, 5, 4, and 5.
[3] D. 48, 9, 3 and 4.
[4] D. 23, 1, 7, 1. See above, pp. 4 and 5.
[5] D. 23, 1, 7, pr.; 18.
[6] D. 24, 2, 2, 2.

three years, on the ground that if he had been present she could have sent him a *nuntius* lawfully terminating her engagement.

4. *Arra sponsalicia.*

The gift made by *sponsus* to *sponsa* or her representatives[1] as earnest of his purpose to marry, forfeited if he refuses to proceed with the match and repaid to him in multiple if the breach comes from the other side, makes its appearance in Roman law in the Byzantine period. It is indeed mentioned in a text of Paul found in the Digest 23, 2, 38, pr., and referring to the betrothal between an imperial official and a provincial woman, but this passage has long been held to be interpolated,[2] and even if Paul did employ the word *arra*, it is clear that he did not use it in the full technical sense which it later acquired.[3]

The interchange of gifts between persons engaged to be married is an ancient practice at Rome, attested by a clause in the *lex Cincia* exempting them from the limitation imposed by that enactment.[4] In the classical law a distinction was made between unconditional gifts and those which were made *adfinitatis coeundae causa*. The latter only, having been made with the clear understanding that they should be revoked if the engagement was broken off, could be reclaimed in the event of failure, not attributable to the giver, to celebrate the marriage.[5] In A.D. 319, Constantine abolished the distinction,[6] and from that time on even unconditional betrothal gifts were to be restored by any

[1] *Arra* may also be given to sponsus, though this *raro accidit*. Mitteis, *Reichsrecht*, p. 266, n. 1, and cf. C. 5, 3, 16, 1.

[2] See above, p. 8, n. 6.

[3] Cornil in Z. S. St. 48, 1928, pp. 61–2.

[4] F. V. 302.

[5] Papinian in F. V. 262. Julian in D. 39, 5, 1, 1. C. 5, 3, 2. 5, 3, 4. 5, 3, 6–9. 5, 3, 15.

[6] C. Th. 3, 5, 2. C. 5, 3, 15.

party breaking off the match, while anything given by that party remained with the other.

This constitution of A. D. 319 is followed by another in A. D. 336, to provide for the death of either party.[1] If the marriage is prevented by the death of *sponsus* or *sponsa*, the girl or her successors keep half of the gifts provided she has received the betrothal kiss, but restore all if there has been nothing more than an agreement to marry. Anything given to *sponsus* must be restored *in toto* to *sponsa* or her successors whether or not the engagement has been sealed by the *osculum*.

The gifts contemplated in these constitutions are not given primarily as earnest of the intention to marry and to reinforce the agreement by establishing a forfeit. Doubtless they serve this purpose incidentally, but the motive behind them is normally a less practical one. They express rather the simple desire to please, or they spring from an impulse of liberality not uncommon in the circumstances. They are by no means completely displaced by the *arra* system which reaches its perfection in the later law.[2]

Arra is much more than a gift. An Eastern institution reaching back to and beyond the Code of Hammurabi, with strong indications pointing to an origin in the bride-price, it appears still, in the Syro-Roman Law Book of the fifth century A. D., to be an integral part of betrothal in the East.[3] It is at the least a usual formality, and when a precious object or considerable sum is thus handed over it becomes substantial security for execution of the agreement. In Roman law *arra*

[1] C. Th. 3, 5, 6. C. 5, 3, 16. [2] Cornil in Z. S. St. 48, 1928, p. 62.
[3] Code of Hammurabi, 159–61, Syro-Roman Law Book, P. 45, 46 a. L. 91 f. Cf. Koschaker, op. cit., pp. 384–5.

never becomes more than an unessential adjunct of the promise to marry, but even here the dominant idea is not liberality but security.[1]

The earliest Imperial enactments dealing specifically with *arra sponsalicia* which have survived, are those of the year A. D. 380 by Gratian, Valentinian and Theodosius. One (C.Th. 3, 5, 10. C. 5, 1, 3) commands restitution of *arra* on the death of one of the parties unless such party has already given cause for breaking the engagement. A second (C.Th. 3, 5, 11) lays down detailed regulations modifying the obligations regarding *arra* according to the age and family status of *sponsa*. We learn here of an earlier law referred to also in C. 5, 1, 5 and C.Th. 3, 6, 1 calling for quadruple restitution of *arra* when she or those acting for her decline to give effect to the engagement. The three Emperors decree that this penalty is not to be exacted if the girl was betrothed before reaching her tenth year, simple restitution only being required in such cases. A third (C.Th. 3, 6, 1. C. 5, 2, 1) exempts from the quadruple restitution the woman who breaks her promise to marry an official of her province. Of the first it should be noted that no distinction is made, according as the *osculum* has or has not intervened, a feature which already marks off *arra* from the ordinary pre-nuptial gifts. As for the law referred to in the second and third, that has not come down to us. It must have been then recent—if we accept the absence of earlier reference to *arra* as sufficient evidence that this institution was not introduced into Roman law before Constantine—though in the second of the above enactments (C.Th. 3, 5, 11) it is described as *vetus constitutio*.

[1] Cornil in Z. S. St. 48, 1928, p. 63.

By A. D. 380 then, *arra sponsalicia* is an institution of well-defined characteristics regulated by enactments valid throughout the Empire. It has not become a universal or essential part of the betrothal agreement; but where it is resorted to certain legally defined consequences follow, at least in the absence of contrary convention. Provided the *sponsa* has reached the age of ten, the *arra* received by her or her parent, guardian, or curator, must be restored in quadruplicate, if they or any of them break off the match without recognized cause.[1] The girl who has accepted a suitor and his *arra* against her will has an action *ex bono et aequo* against those (except apparently *paterfamilias*) who compelled her to accept, by means of which she can recover consequent loss to her own estate.[2] If the marriage has been prevented by the death of one party, the *status quo ante* is to be restored by simple restitution of the *arra* received, unless indeed the defunct had given cause for breaking off, in which case the other side retains the *arra*.[3] All of these rules seem to contemplate exclusively *arra* moving from *sponsus* to *sponsa*, the only form dealt with in the Code of Hammurabi and in the Syro-Roman Law-Book. This is another characteristic differentiating up to this point *arra* from the often mutual, native-Roman ante-nuptial gifts, which are seen in process of modification in the constitutions of Constantine already cited.

C. 5, 1, 5 reproduces a constitution of Leo and Anthemius, dated 1st July 472, which among other changes reduces the compensation for breach of promise to double restitution of the *arra*. Riccobono has attempted to prove this law interpolated, and attributes the

[1] C. Th. 3, 5, 11. [2] Ibid. [3] C. Th. 3, 5, 10. C. 5, 1, 3.

reduction to Justinian[1] but cannot be said to have satisfied the onus of proof.[2] The text is supported by the Syro-Roman Law-Book, P. 46 a,[3] which commands the maiden's parents to restore *arra* and an equivalent.[4]

Leo's law makes *sponsa* herself liable to double repayment only when she is of the full age of twenty-five or has been granted *venia aetatis*. But the father or mother of a girl below that age, having accepted *arra* on her behalf, must restore double, at least where such parent is over twenty-five. There follows a list of reasons recognized as justifying cancellation of betrothal with simple restoration of *arra*. These are, first, anything in the relationship or personal status of the parties making their intermarriage illegal (such reasons being already sufficient to annul the engagement); then, disgraceful or immoral conduct, difference of religion, impotence, 'or other just cause of excuse,' a general clause apparently leaving a good deal to the discretion of the magistrate applied to. But reasons of the latter class, which do not make marriage illegal, must have come to light after betrothal. If already known, they will not exempt from double liability for subsequent breach.[5]

[1] *Arra sponsalicia secondo la const. 5. Cod. de sponsalibus. Studi in honore di Fr. Pepere*, Napoli, 1900.

[2] Krüger, Z. S. St. 22, pp. 52–5, has, I think, disposed of Riccobono's case. Cf. Cornil in Z. S. St. 48, 1928, p. 63, n. 2.

[3] The absence of which in the London MS. is not, as Krüger points out, sufficient proof of its having been added by a late transcriber from Justinian's Code.

[4] Distinguishing, incidentally, between *arra* and gifts made after the day of betrothal, which are to be given back without penalty.

[5] This constitution repeats, with additions, the provisions of that given in C. 1, 4, 16, and bearing the same date. The additions are one of the reasons cited by Riccobono for regarding C. 5, 1, 5, as interpolated.

Under this enactment then, fourfold restitution ceased to be the common rule. But the parties could still set such penalty by agreement. The text limits the change thus: 'nisi specialiter aliud ex communi consensu inter contrahentes de eadem quadrupli ratione placuit.' No sort of forfeit other than *arra* might be validly set up. Any agreement however formal with this object is void, the constitution ending somewhat illogically with a repetition of the old principle, 'in contrahendis nuptiis libera potestas esse debet.'

Finally, this law of A. D. 472 contains a clause applying the same rules, *mutatis mutandis*, for the restoration of *arra* received by *sponsus*—an addition by the imperial legislator to the Eastern custom.

The title *de sponsalibus et arris sponsaliciis* in Justinian's Code closes with an undated constitution limiting the commission payable to marriage brokers to five per cent. of dowry or antenuptial gift, with an absolute maximum of ten *auri librae*.[1]

Krüger explains the difference by the position of C. 1, 4, 16 under the title *De Episcopali Audientia*, the religious excuse being the only one that would naturally call for mention there.

[1] C. 5, 1, 6.

CHAPTER II

CAPACITY AND CONDITIONS

I. *Conubium.*

CONUBIUM is said to exist between a man and a woman when they are capable of legal intermarriage. Under absence of *conubium* the compiler of Ulpian's *Regulae* treats such various obstacles to marriage as foreign citizenship, slavery, and blood relationship within the prohibited degrees.[1] Modern commentators[2] add differences of rank and status, indeed all relative disabilities as distinct from the absolute obstacles such as absence of consent and impuberty. For the purposes of discussion here I include age and physical condition.

(*a*) Nationality.

The two principal legal sources, Gaius, 1, 56, 67, 76–80 and Ulpian, *Regulae*, 5, 2–5. 5, 8, speak of *conubium* as an element necessary to constitute that *justum matrimonium* in which a Roman citizen begets children who will come under his *patria potestas*. The chief question in the minds of Gaius and Ulpian in this connexion is accordingly this—with what persons has the male Roman citizen *conubium*? They deal with this question first from the point of view of nationality. To begin with, *civis Romanus* has *conubium* with *civis Romana*. Secondly, he has *conubium* with those Latins and peregrines who have either individually or in groups been granted the privilege of intermarriage with Rome.

[1] *Reg.* 5, 2–5.

[2] e. g. Girard, *Manuel*, 157–60. There is good authority for this extension of the term. C. 5, 6, 1, for example, speaks of the *senatusconsultum* of Marcus Aurelius as abolishing *conubium* between a female ward and the son of her guardian.

Among the various types of *Latini—prisci*, *coloniarii*, *Juniani*—which were those endowed with this privilege?

The *Latini prisci* or *veteres* are, in the first place, those of the old Latin cities forming part of the League dissolved in 336 B.C.; and, secondly, the inhabitants of the Latin colonies founded by the League or by Rome herself prior to 268 B.C. With the latter date began the foundation of Ariminium and the eleven other colonies established by Rome in Italy before the social war. These colonies had an inferior or colonial Latinity differing perhaps mainly from the superior status in the absence of political rights.[1] This was the status accorded when cities in the provinces or individuals came to be endowed with Latinity. Citizens of these cities, and individuals separately favoured, were *Latini coloniarii*.[2]

It is frequently assumed that all the *Latini prisci* had *conubium*[3] by virtue of provisions in the treaty of confederation or, in the case of the earlier colonies, under the act of foundation. Mommsen, on the other hand, refuses to accept the numerous particular instances of *conubium* as proof of a general regime. There were many mixed marriages; but these, in his opinion, resulted from special treaties with particular cities or tribes, or from individual grants.[4] Certainly, the view that there was a general right of intermarriage through-

[1] Mommsen, *Staatsrecht*, 3, 1, pp. 623–5.

[2] Cf. Girard, *Manuel*, p. 111.

[3] e. g. Voigt, *Römische Rechtsgeschichte*, 1, 258 et seq., who goes so far as to attribute *conubium* to the inhabitants of the 12 colonies; E. Weiss, *Endogamie und Exogamie im römischen Kaiserreich*, Zeits. Sav. 29, pp. 353–4; Girard, *Manuel*, p. 111, n. 5.

[4] *Staatsrecht*, 3, 1, pp. 633–4. Cf. Rossbach, *Römische Ehe*, pp. 461–2, for the same conclusion.

out the Latin league has only these numerous specific instances for basis.

The *lex Minicia*, in Mommsen's reconstruction of Gaius, 1, 79,[1] affords no support to either contention. It appears to have included under *peregrini*, for the purposes of marriage, the inhabitants both of the cities of Latium and of the Latin colonies.[2] But it merely enacted that where there was no *conubium* the child of a marriage between a Roman and non-Roman should not be a Roman citizen. As Gaius points out, this was already the case *jure gentium* if the mother was a non-Roman; the change consisted in making the child of a Roman mother by a man without *conubium* take the condition of the father. Its application to the Latins meant then that the child of a Roman mother and a Latin father not having *conubium* would be a Latin. Where a Latin having *conubium* had a child by a Roman mother, the rule already existed making the child a Latin. And the law does not appear to have affected the converse case, where a Roman married a Latin woman having *conubium*; the children here continued to be Roman citizens (G. 1, 76). Subsequently, Hadrian enacted for the Latins of his day (possibly only *Latini Juniani*) that their children by Roman mothers should be Roman (G. 1, 30 and 80).

As far as the *Latini coloniarii* are concerned, there is not merely nothing to show general possession of *conubium*, but conclusive evidence in the other direction. It is of such, together with *Latini Juniani*, that

[1] See Krüger and Studemund's Gaius, 7th ed., p. 20, and Girard, *Textes*, 4th ed., p. 236. Huschke's reading in Kuebler's Gaius, 1928, though slightly different in form, is to the same effect.

[2] Cf. Karlowa, *Röm. Rg.*, 2, 182.

the classical jurists speak when they use the term *Latini* unqualified, all the *prisci Latini* and all Latin colonists in Italy having become Roman citizens under the *lex Julia*, 90 B.C. *Latini*, then, in the classical period, are either *Latini Juniani* or the inhabitants of provincial colonies or towns endowed with *jus Latii*. And of these Ulpian *Reg.* 5, 4 says—'Conubium habent cives Romani cum civibus Romanis, cum Latinis autem et peregrinis ita si concessum sit.'

The *Latini Juniani* are included in the above statement. There, is, however, special evidence in their case. The *lex Aelia Sentia* provided that, by marrying a Roman or Latin woman before seven adult Roman witnesses and begetting a child, they could obtain Roman citizenship when the child had reached the age of one year, on proof before a magistrate that they had satisfied the conditions of the law (G. 1, 29–31). The wife and child also became Roman citizens, if they were not already so, and the child (G. 1, 66) fell under his father's *potestas*. Now because this form of marriage thus produced all the effects of *justae nuptiae*, there were some who argued that the *lex Aelia Sentia* conferred *conubium* on those who took advantage of its provisions (G. 1, 80). Obviously then, those *Latini Juniani* who did not comply did not possess *conubium*. But the privilege of the *lex Aelia Sentia* was less a grant of conditional *conubium* than a method of acquiring Roman citizenship, forming one of a series of measures designed to encourage population. The Roman citizen had of course the capacity of civil marriage, and the capacity in this instance was, for certain purposes at any rate, retroactive. Hadrian put an end to the discussion by enacting that the child of a Latin and a Roman

woman should always be a Roman citizen.[1] His *senatusconsultum* thus denies the application of the *lex Minicia* to the Latins of his time and the operation in their case of one of the common law incidents of *conubium*, namely the attribution to the children of the father's status. The language tends to show that the *senatusconsultum* did not concern itself overmuch with theoretical considerations which had apparently been interesting the jurists. It simply provided 'ut quo*quo* modo ex Latino et cive Romana natus civis Romanus nascatur'.

To sum up, the Romans had *conubium* with great numbers of Latins, but only in virtue of special grant. Some *peregrini* also enjoyed the privilege. The *peregrini* properly so called were subjects of Rome, not being Roman citizens or Latins but for the most part members of political communities which had acknowledged the Roman supremacy and been either absorbed or granted a measure of autonomy. They are the *socii populi Romani*, Italian and extra-Italian,[2] and the *dediticii*. Gaius[3] speaks of *conubium* with *peregrini* as though it was of common occurrence, but no general grants such as those made to specific Latin towns are recorded.[4] The privilege of the discharged soldier to contract a *matrimonium legitimum* with any peregrine woman[5] was addressed of course to the soldier, not to the *peregrina*.

There was yet another class of subject, the inhabitant of the colony or city of citizens. Some colonies

[1] G. 1, 80.

[2] Cf. Mommsen, *Staatsrecht*, 3, 1, 645 et seq.

[3] e.g. 1, 56 and 76–8.

[4] Mommsen, *Staatsrecht*, 3, 1, p. 715 and n. 1.

[5] G. 1, 57. Cf. the soldier's diplomas, of which a specimen is reproduced, Girard, *Textes*, pp. 126–7.

were founded, and some cities endowed, with full Roman citizenship. Their inhabitants had all the private and political rights of the inhabitant of Rome. But there was a great number of Italian cities whose inhabitants were given private but not political citizenship. Their inhabitants were the *cives sine suffragio*, and of these some had and some had not *conubium*. Thus, it was granted to the Campanians and refused to the Anagnini. This class of citizenship was, however, a temporary institution. It was given first to the Caerites, probably in the fifth century B. C.; and the last grant appears to have been that to the Sabines in 290 B. C. Most of the cities concerned had acquired full citizenship before the Social War, the remainder acquired it then.[1]

By his constitution of A. D. 212 Caracalla made full Roman citizenship the common status for free subjects of the Empire. The grant was not so universal as Ulpian's words in D. 1, 5, 17 would indicate; it may have extended only to peoples municipally organized in the Greco-Roman fashion, and in any case did not affect persons who after this date became *Latini Juniani* by irregular manumission, or *dediticii*, or peoples subsequently incorporated in the Empire. Nevertheless, it entailed a great increase in the territorial and racial extent of the Roman marriage. Some of the exceptions had disappeared before the reign of Justinian, and he abolished the classes of *Latini Juniani* and *dediticii*. In the meantime, however, Christianity had brought with it one important restriction upon the very general *conubium* between the peoples under the Roman domination. A

[1] Mommsen, *Staatsrecht*, 3, 1, pp. 570–89, and Livy, 9, 43 and 23, 1, 7, cited ibid., p. 573, n. 9. and 577, n. 3.

constitution of Valentinian, Theodosius, and Arcadius (C. Th. 3, 7, 2. C. 1, 9, 6, A.D. 388) forbade intermarriage between Christians and Jews, subjecting any who disregarded the prohibition to the penalties of adultery.

(*b*) Rank and status.

With slaves there is no *conubium*.[1] Even between slaves there is no legal marriage, only a *de facto* relation called *contubernium*. Any legal consequences of such unions depended solely on the blood relationship between the children, and between the children and their parents.

Intermarriage between patricians and plebeians only became legal after the *lex Canuleia* of 445 B.C.[2] The prohibition, probably a direct consequence of the earlier absence of citizenship in the plebeians, had been maintained in the XII Tables,[3] and its abrogation was one of the first steps towards the levelling of the orders.

[1] Ulpian, *Reg.* 5, 5. The *adscripticius* of the late Empire cannot marry a free woman. Nov. 22, *c.* 17.

[2] Livy, 4, 1.

[3] Cicero, *De Rep.* 2, 37, 63. The language here as well as in Dionysius, 10, 60 and 11, 28, and still more in Livy, 4, 4, 5 and 4, 6, represents the prohibition as resulting from, not merely confirmed by, one of the last two tables. But there is much in favour of the view (Mommsen, *Staatsrecht*, 3, 1, p. 79, and Karlowa, *Röm Rg.* 2, p. 167) that this was simply a declaration of existing customary law. That marriage between the two orders should have been allowed to establish itself, would have been a surprising discrepancy in the general attitude of the higher to the lower. There is some inconsistency in Livy's account itself, in that the irate patricians speak with horror of the possibility of intermarriage threatened by the *rogatio* of Canuleius, which they would hardly do if such mixture of the orders had been perfectly legal only seven years earlier, i.e., before the enactment of the last two tables. Mommsen, (*Staatsrecht*, 3, 1, p. 79,)thinks that the prohibition extended only to the marriage of a patrician with a plebeian woman, in other words, that a plebeian could legally marry a patrician woman, the sole object in view being to prevent the adulteration of the *gentes*. Karlowa, (op. cit., 2

Mommsen,[1] followed by Girard[2] and by P. Meyer,[3] holds that marriage was prohibited between *ingenui* and *libertini*, that this rule was unaffected by the *lex Canuleia* and was only repealed by the *lex Julia de Maritandis Ordinibus* of Augustus, 18 B. C. This view is based upon Dio Cassius 54, 16 and 56, 7, who speaks of a law of 18 B. C., permitting marriage with freedwomen to all except senators; upon Celsus in D. 23, 2, 23, who makes the same statement about the *lex Papia* of A. D. 9., the provisions of which are inextricably confused by the sources with those of the *lex Julia de Maritandis Ordinibus*;[4] upon Livy 39, 19, who records a *senatus-consultum* of 186 B. C., allowing Hispalla Fecenia, a prostitute, as a reward for her services to the State, to marry an *ingenuus* without prejudice to his status; and finally upon various texts[5] implying inferiority or even disability in persons born of *libertini* or *libertinae*.

167) going farther in the same direction, holds that a patrician might marry a plebeian woman by *coemptio*, whereby she came under his *manus* and the children under his *potestas*, but neither she nor they became members of his *gens* or patricians. Rossbach, op. cit., 455, arguing from the language used by Livy 4, 4, 5—'ne conubium patribus cum plebe esset'—and 4, 4, 7—'nec ducendo ex plebe, neque vestras filias sororesque enubere sinendo e patribus,' denies all legal intermarriage between the orders. Rossbach's version is more compatible with the probable source of the prohibition, viz., the absence of common citizenship, traces of which survive in the later absence of community in *sacra* (Dionysius, 10, 60). But the whole matter is obscure, and we do not possess the first elements necessary for clearing it up. In the present state of our knowledge, the statement in the text seems the least conjectural.

[1] *Staatsrecht*, 3, 1, pp. 429–31.

[2] *Manuel*, pp. 125 and 160.

[3] *Konkubinat*, pp. 24 and 27.

[4] Jörs, *Verhältniss &c.*, pp. 4 et seq. The two laws are commonly cited together as *lex Julia et Papia*. See e. g., Ulpian, *Reg.* 16, 2. D. 23, 1, 16. 23, 2, 43–50. 50, 16, 128–53.

[5] Cic. *Top.* 6, 29; Livy 6, 40; Aulus Gellius 1, 12, 13-15 and Seneca, *Controv.* 1, 2, 1–11–13–15.

Against all this must be set the fact that Paul in D. 23, 2, 44 and the author of Ulpian, *Reg.* 13, 1 and 2 speak of the provisions of the *lex Julia* as prohibitions, not as permissions, which they could hardly do if they had known the law as one allowing marriage between *libertini* and *ingenui* with the exception of senators and their descendants. Similarly Paul in D. 23, 2, 16, has this—'Oratione divi Marci cavetur ut, si senatoris filia libertino nupsisset, nec nuptiae essent'.

As for the *senatusconsultum* cited by Livy, Karlowa [1] points out that the express purpose of that enactment was to exempt the *ingenuus* from the *fraus* and *ignominia* which would ordinarily be the result of marriage with a freedwoman who was also a prostitute. The text then points rather to a loss of respect and caste than to any illicit quality in the union. Rossbach [2] had already surmised that ancient Roman morality must have frowned upon *mésalliances* with freedwomen, nor had they ceased to be regarded as somewhat reprehensible even in the time of Ulpian, who says in D. 25, 7, 1, pr., 'quippe cum honestius sit patrono libertam concubinam quam matrem familias habere.'

Mommsen is forced to recognize a difficulty in *pro Sest.* 52, 110, where Cicero says of a Roman *eques*: 'ut credo, non libidinis causa, sed ut plebicola videretur, libertinam duxit uxorem.' This again implies loss of caste rather than illegality. He accepts the passage as proof that a milder rule had established itself by the time of Cicero. Augustus then re-enacted a rule which had ceased to be observed, but limited its field of application to the senatorial order.

The text (Cic. *Top.* 6, 29) upon which Mommsen

[1] *Röm. Rg.*, 2, 172, n. 2. [2] *Römische Ehe*, p. 456

relies to prove that the child of a *libertinus* or *libertina* could have no right of gentile succession, and accordingly that union with an ex-slave was not recognized as a legal Roman marriage, applies strictly, by his own admission, only to patrician families and to those plebeian families established by emancipation from a patrician *gens*.[1] It cannot, then, prove more than a lack of *conubium* between such families and former slaves, if indeed it proves so much. At any rate it has no bearing upon the multitude of *ingenui* who had no patrician connexion. Aulus Gellius and Seneca are cited[2] as authority for the statement that only women whose parents had never been slaves could be vestal virgins. But this special requirement for a public office is small indication of the legal status of unions between *ingenui* and *libertini*.

What is perhaps the most serious support for the view that the terms of the *lex Julia* were a permission or recognition of legal marriage between *ingenui* and *libertini*, rather than a prohibition of such marriages where a person of senatorial rank was concerned, seems to have come in for little attention. That is the fact that the *lex Julia* was an effort to encourage marriage and the procreation of lawful children. A law with this purpose would be expected to extend rather than restrict the range of eligible consorts. But the commonly heterogeneous character of the Roman statutes weakens this argument.

I conclude then, with Karlowa,[3] that the refusal of the character of *justum matrimonium* to the unions between *ingenui* and *libertini* is unproven. I would go

[1] *Staatsrecht*, 3, 1, p. 74, n. 3.

[2] *Supra*, p. 31, n. 5.

[3] *Röm. Rg.*, 2, 172.

further and say that the existence of such a general rule is intrinsically improbable. A freedman or freedwoman was essentially a plebeian, unless adrogated by a patrician, and there was accordingly no *justum matrimonium* between a patrician and an ex-slave before the *lex Canuleia*. This barrier may even have survived the *lex Canuleia*, though it is doubtful whether the survival is proved by Mommsen's texts. But a general prohibition of marriage with *libertini*, affecting also the *ingenui* of the *plebs*, would have meant a division of the plebeian order which would hardly have escaped abundant notice.[1]

This much, however, is well established—the freedman may not, at least after the constitution of Severus in C. 5, 4, 3, marry his patroness or the widow or female descendant of his patron. Condemnation to the mines was the extreme penalty for such an offence, and the prohibition applied whether the woman was of senatorial rank or not.[2] But if she was a woman of very low condition, the union was allowed to stand.[3]

The *lex Julia*, to take Paul's report of it in D. 23, 2, 44, forbade senators, and their descendants through males to the third degree inclusive, to marry freedmen or freed women. These persons also might not marry any one who, or whose father or mother, was practising or had practised the theatrical profession. According to Ulpian, *Reg.* 13 and 16, 2, the law further forbade *ingenui* to marry procuresses, slave-girls manumitted by procurers or procuresses, women taken in adultery

[1] The exclusion of *libertini* from regular military service and from the magistracies is well attested. Mommsen, *Staatsrecht*, 3, 1, 448 et seq., 452 et seq., and 1, 487 et seq.

[2] Paul, *Sent.* 2, 19, 9. C. 5, 4, 3.

[3] D. 23, 2, 13.

or condemned in a public prosecution, actresses, or (if the reading proposed by Mommsen and Huschke be correct[1]) prostitutes. These provisions are summed up roughly in *Reg.* 16, 2, as an exclusion of *famosae*, which tends to confirm Mommsen's and Huschke's correction.

The *oratio divi Marci* reported by Paul in D. 23, 2, 16 and Ulpian in D. 23, 1, 16, which seems merely to repeat one of the clauses of the *lex Julia*, is explained by Savigny[2] as rendering null and void a union which the *lex Julia* had merely made insufficient to relieve the consorts from the penalties of celibacy and childlessness. Rossbach[3] accepts this explanation as do Esmein[4] and Jörs.[5] Girard[6] rejects it.

Savigny, Rossbach, Esmein and Jörs ask us then to believe that the Augustan marriage laws, though they prohibited certain unions, did not declare them null. The distinction, which was not uncommon in Roman legislation, is the basis of the classification of *leges* as *perfectae*, *imperfectae*, and *minus quam perfectae*.[7] This clause of the *lex Julia de Maritandis Ordinibus* should be classified, if Savigny and his followers are right, as *minus quam perfecta*. It did not annul but penalized by withdrawing some of the normal advantages of marriage

[1] See Girard, *Textes*, p. 470, n. 1. Unamended, the text makes prostitutes ineligible only for senators and their descendants. Fr. Schulz in *Die Epitome Ulpiani*, Bonn, 1926, agrees that the phrase 'item corpore quaestum facientem' has been transposed from 13, 2, but regards it in any case as a gloss. It may be a gloss, but it seems quite clear that the *lex Julia et Papia* included prostitutes in the prohibited class—D. 23, 2, 41, pr. and 23, 2, 43 especially at 4, 'lege notatur'.

[2] *System*, 2, App. VII. [3] Op. cit. 457 et seq.

[4] *Mélanges*, pp. 95–6.

[5] *Ehegesetze*, pp. 21–2, and *Römisches Privatrecht*, p. 194.

[6] *Manuel*, p. 162. [7] Ulpian, *Reg.* 1, in Girard, *Textes*, p. 460.

and, in addition, depriving the consorts of all mutual *jus capiendi*.[1]

Let us see what there is in favour of this view. In the first place, Savigny cites C. 5, 9, 1–2 as proof that a union prohibited by the *lex Julia* might still be recognized as marriage. The woman who remarries within the *tempus lugendi* is forbidden to hand over more than one-third of her property as dowry to *secundus vir*. Now this offence, which dates from an ancient period, rendered the woman *famosa* or *infamis*.[2] and the *lex Julia* prohibited marriage with such persons.[3] By her hasty remarriage, then, the widow placed herself in a prohibited class, and if the *lex Julia* had been *perfecta*, the union must have been treated as void. The mention of *secundus vir* and *dos* shows recognition of *matrimonium*; therefore the *lex* was not *perfecta*.

We have, secondly, inscriptional evidence of marriages between *patronae*, some of whom are even of senatorial rank, and their freedmen. The inscriptions date from the period between the *lex Julia* and the constitution of Severus in C. 5, 4, 3, and their public tributes to *uxor pientissima* and *conjunx fidelissima* are difficult to reconcile with any theory of nullity.[4]

Finally, the language of the jurists when they speak of the Augustan laws is strikingly ill adapted to mere *de facto* cohabitation. The Antonine lawyer Terentius Clemens says in his eighth book *ad legem Juliam et Papiam*, D. 23, 2, 48, 1—'Si ignominiosam libertam

[1] Ulpian, *Reg.* 16, 2.

[2] F. V. 320. Paul, *Sent.* 1, 21, 13. Greenidge, *Infamia in Roman Law*, p. 4, n. 1 and pp. 173–4.

[3] Ulpian, *Reg.* 16, 2.

[4] For citations see Meyer, *Konkubinat*, pp. 64–5.

suam patronus uxorem duxerit, placet, quia contra legem maritus sit, non habere eum hoc legis beneficium.' This looks distinctly like marriage, though the patron, because he has violated the *lex* by taking an *ignominiosa* to wife, cannot prevent her from divorcing him and marrying another. Similarly the *Regulae*, 16, 2, speak of *vir et uxor* and *matrimonium*, though the union is stated to be *contra legem Juliam Papiamque*. If we contrast this with passages dealing with unions admittedly void, it is difficult to believe that the terms used are due to mere negligence or poverty of vocabulary. Thus *Inst.* 1, 10, 12 'Si adversus ea quae diximus aliqui coierint, nec vir nec uxor nec nuptiae nec matrimonium nec dos intelligitur—' and Ulpian in D. 24, 1, 3, 1 'ne sit omnino matrimonium, donatio valebit: . . . quia nuptiae non sunt' (the position after the *senatusconsultum divi Marci*)—seem to depict situations radically different from those contemplated in *Regulae*, 16, 2 or D. 23, 2, 48, 1.

There are answers of a sort to all these arguments. It may be said that 'famosam' in *Reg.* 16, 2 is simply a general word describing the various kinds of objectionable women specifically mentioned in the *lex Julia*, and that this statute did not contain a general prohibition of marriage with *infames*. The statute may have mentioned only males of senatorial rank, leaving it to the *senatusconsultum* of Marcus to extend the prohibition of marriage with ex-slaves to the female descendants of senators.[1] That would explain the need for the

[1] Paul in D. 23, 2, 44, is not necessarily quoting the text of the statute; he may be merely giving the law as it stood in his day, that is to say, after the *senatusconsultum* of Marcus. Ulpian in *Reg.* 13 and 16, 2 mentions male senatorials only.

senatusconsultum and, possibly, the marriages attested by our inscriptions. Or it may be held with Meyer[1] that the *senatusconsultum* was merely a re-enactment of a law falling into desuetude. Finally, we may be told that the language of the jurists is not to be depended upon, that Ulpian uses *nupserit*[2] and Gaius *nuptiae*[3] of an illicit or even criminal cohabitation.

After much hesitation I have come to the conclusion that Savigny was right. Whatever its original intention, the *lex Julia et Papia* appears to have been interpreted simply as denying to those who married in contravention of its provisions any exemption from the penalties of celibacy and as refusing to the offending consorts all rights of testate or intestate succession to one another. If in other respects the marriage was valid, then the children, as a principal consequence, ought to have been *justi*. Now in F.V. 168 there is a contrast between children *justi secundum has leges* (probably our marriage statutes) and those *justi secundum jus civile*. Mommsen's restoration of the opening part of this text, accepted by Girard, would emphasize the existence of the two categories of *justi* ('*Justos autem liberos esse oportet, id est non naturales, sed ex vero matrimonio etsi non secundum legem Juliam Papiamve quaesitos.*') and is in flagrant contradiction with Girard's view that the *lex Julia* avoided the marriages against which it was directed.[4] The children were, I believe, *justi*, as were

[1] Op. cit., p. 24.

[2] D. 24, 1, 3, 1. Cf. Pomponius in D. 23, 2, 4. [3] G. 1, 64.

[4] Krüger, Mommsen, and Studemund, *Collectio*, 3, 1890, p. 60, and compare Girard, *Textes*, p. 536, n. 3. *Manuel*, p. 162, n. 11. Meyer, *Konkubinat*, pp. 57–8, rejects this restoration in favour of something which would recognize the issue of a *matrimonium juris gentium*, as to which see below, pp. 96–106.

those begotten of a *Romana* by a *peregrinus* with *conubium* (or after Hadrian's *senatusconsultum*, without *conubium*).[1] Whether they were *in potestate* is another question, possibly, in view of G. 1, 55, *Inst.* 1, 9, pr. and 1, 10, pr., to be answered in the negative. For to be *in potestate* children must be born *ex justis nuptiis*, and *justae nuptiae* are defined in this connexion as *secundum praecepta legum*. That the *justi liberi* of a Roman citizen were not always in his *potestas* is shown by G. 1, 93–4.

The prohibitions of the *lex Julia* and of the *senatusconsultum divi Marci* were finally repealed by Justinian in C. 5, 4, 29, 6—which completes Justin's legislation in C. 5, 4, 23—and in Nov. 117, c. 6.

(*c*) Office or employment.

A person otherwise capable of marriage may lose *conubium* either generally or in relation to a determined person or class of persons by reason of office or employment. This is the case of soldiers, imperial officials, and tutors.

1. Soldiers.

The question of the soldier's *conubium* leads us into a conflict between texts of the classical jurists reproduced in the Digest of Justinian, on the one hand, and certain *papyri* and historical notices on the other.

D. 23, 2, 35 and 65. 29, 1, 7 and 16. 49, 17, 16, pr., taken by themselves, would prove not merely that a marriage remains valid when the husband becomes a soldier, but that a soldier may marry. On the other hand, Lupus, Prefect of Egypt in A.D. 117, refuses to allow a claim for restoration of dowry concealed in the

[1] G. 1, 77. When Ulpian speaks of *filii justi* and *injusti* in F. V. 194, he probably means *secundum legem Juliam* et *Papiam*; otherwise, as Mitteis points out, *Privatrecht*, p. 70, n. 28, he contradicts his statement of the law in F. V. 168.

form of deposit on the ground *οὐ γὰρ ἔξεστιν στρατιώτην γαμεῖν*.[1] A similar judgement is rendered in A. D. 134 by a delegate of the Egyptian Prefect, who cites the rule *Στρα[τι]ώ[ταις μὲν ἀπηγό]ρευται γυναῖκας ἐλ[έσ]θαι*.[2] In A. D. 115 the Prefect of Egypt, M. Petronius Mamertinus, declares in a judgement *οὐκ ἐδύνατο Μαρτιά[λιος] στρατευόμενος νόμιμον υἱὸν ἔχειν*.[3] In A. D. 120 a rescript of Hadrian[4] to C. Rammius Martialis, Prefect of Egypt, after acknowledging the rule that children born during their father's military service are debarred from his succession because they are not lawful children, yet grants them *bonorum possessio ab intestato* in the praetorian class of *cognati*. Mitteis[5] takes this as proving the annulment or at least the suspension of a marriage validly celebrated before the entry into service. Girard[6] accepts it as final proof of the soldier's incapacity. Examples of such decisions might be multiplied.[7]

As for the historians, Tacitus, *Ann.* 14. 27, has this concerning the discharged legionaries—'neque conjugiis suscipiendis neque alendis liberis sueti orbas sine posteris domos relinquebant': Dio Cassius 60, 24 reports that Claudius *τοῖς τε στρατευομένοις, ἐπειδὴ γυναῖκας οὐκ ἐδύναντο ἔκ γε τῶν νόμων ἔχειν, τὰ τῶν γεγαμηκότων δικαιώματα ἔδωκε*; Herodian 3, 8, 4, relates that Severus, among many other new concessions to the soldiery, allowed them *γυναιξί τε συνοικεῖν*.

Tassistro[8] accepts the juristic texts cited above as

[1] Mitteis-Wilcken, *Papyruskunde*, 2, 2, p. 419.
[2] Ibid., p. 420. [3] Ibid., p. 421. [4] Ibid., p. 424.
[5] Ibid., 2, 1, p. 282 and n. 3. Cf. 2, 2, p. 422, col. v—*ὁ γεννηθεὶς οὐ δύναται εἶναι νόμιμος υἱός*.
[6] *Textes*, p. 194. [7] See Meyer, *Konkubinat*, § 25.
[8] *Il Matrimonio dei soldati romani*, Rome, 1901—*Studi e documenti di storia e diritto*. Anno 22, 1901.

proving the general legality of soldiers' marriages, and tries to explain the *papyri* as decisions based upon Egyptian provincial law, disposing of the other refractory material as references to the prohibition of marriages between imperial officials (a prohibition which he extends even to the private soldier[1]) and provincial women, or to the general rule of discipline forbidding soldiers to cohabit with women. But Erman very justly points out that the Roman citizen soldier was not governed by local but by imperial law, and that the legality of his marriage must be judged exclusively by that law.

The prevailing view now is that the Republican rule forbidding soldiers to cohabit with women during their service, which did not touch the validity of their marriages, was re-enacted in more drastic form by one of the early Emperors, probably Augustus.[2] The vehicle for the new and sharpened regulation, which deprived at least the common soldier of *conubium* until his discharge, was the imperial mandate to governors and commanders, a form of legislation which lent itself to local and temporary variation and to exceptions of favour. How long the prohibition remained in force is open to some doubt. It has at any rate disappeared from the law before the end of the fourth century, and the passage already quoted from Herodian, which reports at any rate a temporary relaxation, may denote final repeal. As far as officers were concerned, even those of subaltern rank, the prohibition broke down much

[1] Contra, H. Erman, Z. S. St., 1901, p. 240.

[2] See, in addition to the writers already cited, Levy, *Verschollenheit*, p. 148, where it is demonstrated that the reason for the restriction was military discipline, not the alleged impossibility of cohabitation Women were no strangers in the imperial camps.

earlier, as Meyer is able to demonstrate from a mass of inscriptional material:[1] and the explanation of the statements made by the jurists may well be that suggested by Erman[2] and accepted by Mitteis,[3] namely that they refer to officers' marriages, the more so in that persons consulting the jurists would generally be of the officer-class. On the other hand, military officers fell under the regulation next to be dealt with against marriages between imperial officials and women of their provinces.

2. Imperial officials.

The Emperor's mandate was the source of another restriction, namely the rule that officials engaged in the administration or defence of the provinces might not, during their period of office, marry a woman born or domiciled in their province. The origin of this prohibition is clearly stated by Paul, D. 23, 2, 65, pr., Ulpian, D. 24, 1, 3, 1, and Marcian, D. 34, 9, 2, 1, who described such unions as *contra mandata*. Nor is there any doubt of the sanction, which is nullity.[4] But according to Paul the prohibition does not apply to the military officer, possibly not to any official, serving in his native province.

Paul's 'qui militant' and Ulpian's 'qui meret' have been taken[5] as proving that the mandate, which clearly included military officers, applied also to the private soldier. But if this had been so, Papinian would have had no reason for specifying 'praefectus cohortis vel equitum aut tribunus' in D. 23, 2, 63. Nor is the term *officium*, also invariably used in the texts to describe the position of the person affected by the prohibition,

[1] *Konkubinat*, p. 104. [2] Z. S. St., 22, 1901, p. 237, n. 1.

[3] *Papyruskunde*, 2, 1, p. 283.

[4] Ulpian and Paul, loc. cit.; Papinian, D. 23, 2, 63.

[5] e.g. Tassistro, loc. cit.

applicable to the situation of the private soldier. The reason assigned for the rule by Papinian is also against the extensive interpretation. Papinian says that the *potentatus* of the official makes the prohibition necessary, the motive being the same as in the prohibition of marriage between tutor and ward, to wit, the danger of undue influence or fraud. The private soldier can hardly be said to have 'potentatus'. Finally, of course, if we are right in the opinion that the private soldier's marriage was generally invalid, there was no need for a special prohibition relating only to the women of the province in which he was serving.

As the classical jurists knew it, the rule seems clearly to have applied only to provincial officials, not to those engaged in the government of the Empire as a whole and situated at Rome, or to magistrates of Rome and non-provincial Italy. In a lesser degree these are affected by a constitution of Gratian, Valentinian, and Theodosius, dated A. D. 380,[1] which imposes a fine of ten gold pounds and other penalties upon any person endowed with public authority who uses it for the purpose of bringing about a marriage against the will of the woman or her parents.

The provincial official might not, according to Marcianus, D. 23, 2, 27, consent to the marriage of a son, but Paul says in D. 23, 2, 38, 2, that he might give a daughter in marriage and constitute a dowry for her. A similar distinction will appear in connexion with *pupillae*, and it seems to rest upon the much more substantial interest of a *pater* in the married establishment of a *filius in potestate* than in that of a daughter.

A *de facto* marriage concluded in violation of the

[1] C. 5, 7, 1.

mandate became legally valid on the termination of the period of office provided the parties were so minded. But the transformation had no retroactive effect: children conceived and born thereafter were legitimate, not those conceived or born during the period of office.[1]

3. Tutor and ward.

A *senatusconsultum* passed under Marcus and Commodus (A.D. 175–80) prohibits marriage between a female ward and her tutor or his son or grandson.[2] Callistratus in D. 23, 2, 64, 1, gives the reason for this enactment. It was designed to prevent any usurpation of or misdealings with the girl's property which would have been covered by the ensuing marriage. She was not to be placed in a position which would hinder the exaction of a strict account of the tutorship.[3] That is why a *heres extraneus* of the tutor, being bound to account, was according to Callistratus subject to the same disability:[4] while a son, even one who had no share in his father's succession, might not marry the ward when the relation was terminated by his father's death.[5]

The *senatusconsultum* did not apply where the girl's father had betrothed her to her guardian or had in his will expressed the wish that they should marry (*testamento destinare*).[6] Where the guardian was grandfather of his ward, he might marry her to a grandson, her cousin, because his presumed affection removed suspicion of fraud.[7]

A natural extension of the terms of this enactment is suggested by Tryphoninus in D. 23, 2, 67, 2, when he expresses the opinion that where the tutor is a *filius-familias*, the *pater* should not marry *pupilla*.

[1] Paul in D. 23, 2, 65, 1; and C. 5, 4, 6. [2] D. 23, 2, 59; 60; 63; 64; 67.
[3] Cf. C. 5, 6, 7. [4] D. 23, 2, 64, 1. [5] D. 23, 2, 67, pr.
[6] D. 23, 2, 36, and 66, pr. D. 48, 5, 7. C. 5, 6, 6, 1. [7] D. 23, 2, 67, 1.

A large number of texts also make the *senatusconsultum* prohibit the marriage of curator and ward.[1] Those in the Digest and Code have long been suspected of interpolation, but Fragmenta Vaticana, 201, has constituted a formidable obstacle to the acceptance of this view. Solazzi, however, has not hesitated to attack the passage and confidently adopts the conclusion that, like his long list of excerpts from the *corpus juris*, it has been altered.[2] According to him, then, the *senatusconsultum* dealt exclusively with *tutores* and *pupillae*. On the whole, the case for interpolation, though by no means free of doubt and difficulty, is the stronger. The grammatical and syntactical defects of many of the texts in question are obvious, the use of *pupilla* in conjunction with *curator* is a strikingly frequent anomaly, and the need of a special rule on the subject of curators would certainly be much greater when it became usual for the *adolescens* to have such a guide permanently assigned to him than it was in the time of Marcus Aurelius, when an appointment would normally only be made for a special purpose. In cases where a curator was actually administering, as one *ventri bonisque datus* was, the *senatusconsultum* was probably applied by a juristic extension of its 'sententia'.[3] But with the development of curatorship as the normal continuation of *tutela*, subjecting the *adolescens* to practically the same limitations as the *pupillus*, the need and the reason for including the *curator* in the prohibition must have

[1] e.g. F. V. 201–2. D. 23, 2, 36. 23, 2, 66, pr.; 67, 2 and 3 and 5. 48, 5, 7. C. 5, 6, 7.

[2] *Minore Età*, pp. 43–51.

[3] Ibid., pp. 46–8, citing D. 23, 2, 67, 4. 23, 2, 64, 1. In C. 5, 62, 17, which suggests a similar extension, the 'verba deficiant' may with some reason be interpreted as indicating a lack of any mention of curators in the enactment.

become as obvious as for the tutor. The same rule was in practice applied to both, and the compilers interpolated the texts to make them conform to practice. Their emendations are, however, far from complete, for many of the passages concerned with the prohibition speak only of tutors.[1] This fact in itself adds support to the interpolation theory.

Marriage between tutor or curator and ward did not become permissible immediately on termination of the office. In D. 23, 2, 62, 2, Papinian appears to state that the tutor who has rendered account may not marry his ex-ward 'ante constitutum tempus aetatis ejus', even where she has already become a mother in another marriage and has thus presumably escaped, *jure liberorum*, from perpetual guardianship. The 'ante constitutum tempus' is defined by Paul in D. 23, 2, 66, pr., as 'intra vicesimum et sextum annum'.[2] Complete majority was at twenty-five, but an extra year was added here evidently to afford the girl full opportunity of ascertaining for herself whether she had any outstanding claim against her tutor or curator and, if so, of taking action on it.[3] But the specification of this particular age as liberating the parties from the restriction may well seem an anomaly in the period of Papinian and Paul when the rule of lifelong wardship for women was still at least formally unrepealed. In such a period it is difficult to see why any special significance, at least in the relations of tutor and female ward, should be attached to a woman's arrival at twenty-five years.[4]

[1] e.g. D. 23, 1, 15. 23, 2, 59; 60, 5; 62; 63; 64. 24, 1, 32, 28. 28, 2, 28, 3. 30, 128. 34, 9, 2, 1. C. 5, 6, 1 and 4. 5, 62, 4, 1.

[2] Cf. Marcian in D. 48, 5, 7.

[3] Cf. C. 5, 6, 6, pr.

[4] Adolescent women had curators as well as tutors, and twenty-five was probably the age at which their curatorship ended. But it is by no

On the other hand, twenty-five becomes, before the time of Justinian, the age at which a woman, like a man, attains to the free and unaided exercise of her rights. The 'ante constitutum tempus aetatis ejus' and the 'intra vicesimum et sextum annum' may therefore with good reason be regarded as interpolations.[1] If that is so the prohibition was unlimited as to age in Paul's time.[2] But when, at some point between Diocletian and Justinian,[3] women ceased to be under normally perpetual guardianship only terminated by such special circumstances as *jus liberorum*, it became law that a guardian or his descendant might marry a ward after their accounts had been settled and she had been in possession for one year of complete independence. The insertion of this fixed age by the compilers is doubtless part of the same retouching as introduced the curator to the texts.

The sanction of this enactment was, in the first place, the nullity of the union and consequent illegitimacy of any children, and secondly infamy for the tutor or curator.[4] Paul also mentions in the passage of the Digest just cited further punishment that might be inflicted *extra ordinem* in proportion to the station of the girl.

(*d*) Relationship.

No marriage is possible between ascendant and descendant, however remote the degree of relationship

means certain that the prohibition had been extended to curators as early as Papinian and Paul.

[1] See Krueger's Digest, which quotes Noodt on the first passage.

[2] No limit appears in D. 23, 2, 36, which is likewise by Paul.

[3] Not later than A.D. 410. C. Th. 8, 17, 3. C. 8, 58, 1.

[4] D. 23, 2, 66, pr. See Solazzi, *Minore Età*, p. 49, for interpretation of *uterque* as referring to *tutor vel curator*, not to *pater* and *filius*, and compare C. 5, 6, 7.

and whether the connexion be by blood or adoption. Emancipation has no effect on this prohibition even where the relation is purely adoptive and where, accordingly, no bond of cognation survives the act of liberation from *potestas*.[1]

Between collaterals the ancient law forbade marriage up to the sixth degree inclusive. Second cousins, that is to say, could not intermarry. This point was formerly disputed,[2] but is now conceded in view of the fragment of Livy 20 discovered by P. Krüger and reproduced in *Hermes*, 4, 372: 'P. Celius patricius primus adversus veterem morem intra septimum cognationis gradum duxit uxorem. Ob hoc M. Rutilius plebeius sponsam sibi praeripi non exemplo nuptiarum dicens sedicionem populi concitavit. . .' After the second Punic war, we find instances of intermarriage between first cousins,[3] and this has become if not frequent at least common enough to excite little remark before the end of the Republic.[4] A further step was taken when Claudius married his brother's daughter Agrippina. Gaius[5]

[1] G. 1, 59. Ulpian, *Reg.* 5, 6. Inst. 1, 10, 1. Justinian even prohibits the intermarriage of godfather and goddaughter on the ground of their religious relationship. C. 5, 4, 26, 2, A.D. 530. The same constitution mentions an ancient controversy as to the legality of marriage with a foster-child. Justinian allows the marriage where the girl was taken in as a slave and afterwards emancipated, but not where she had occupied from the beginning the position of a daughter.

[2] See for example Rossbach, *Römische Ehe*, pp. 432–3.

[3] Livy, 42, 34.

[4] Cicero, *pro Cluentio*, 5; Plutarch, *Brutus*, 13, and *Antonius*, 9. Cf. Tac. *Ann.* 12, 6, and D. 28, 7, 23–4. Augustinus, however, declares it rare. *De Civ. Dei* 15, 16.

[5] 1, 62. Cf. Tac. *Ann.* 12, 6–7. I may marry the daughter of an adoptive sister, because there is no link either of cognation or agnation, and for the same reason the half-sister (by the same mother, not father) of my adoptive father. D. 23, 2, 12, 4. Inst. 1, 10, 3.

states that after this precedent the law, while it allowed marriage with a brother's daughter, forbade it with a sister's daughter or with an aunt. But this union of relatives in the third degree was made a capital crime by Constantius and Constans.[1] The intermarriage of first cousins became illegal in the reign of Theodosius the Great,[2] but was permitted again from A.D. 405 onward.[3] The rule which finally prevailed allowed collaterals to intermarry provided neither was related in the first degree to the common ancestor. This excluded not only uncle and niece, or aunt and nephew, but also great-uncle and great-niece.[4]

A *de facto* blood relationship has the same effect as one proceeding *ex justis nuptiis*. Thus a freedman may not marry his mother or sister, or sister's daughter, nor may any one marry an illegitimate sister.[5]

A collateral relationship arising from adoption is no bar to marriage when an emancipation has released either party from *potestas*. Thus I may marry one who has been my adoptive sister after either of us has been emancipated.[6]

Relationship by a terminated marriage does not appear to have become a bar until after the end of the Republic, and for a long time had this effect only in the direct line. Cicero says that the mother of Cluentius married her son-in-law,[7] but Gaius[8] declares such a

[1] C. Th. 3, 12, 1. A.D. 342.

[2] C. Th. 3, 10, 1 and 3, 12, 3. Ambrosius, *Epistulae*, Book 8, Letter 66, in *Opera Omnia*, Basle, 1555. It seems to have been possible to obtain imperial dispensation. C. Th. 3, 10, 1.

[3] C. 5, 4, 19. Inst. 1, 10, 4.

[4] Inst. 1, 10, 3.

[5] D. 23, 2, 8; 14, 2; 54.

[6] G. 1, 61. Inst. 1, 10, 2.

[7] *pro Cluentio*, 5, 14.

[8] G. 1, 63. In D. 24, 3, 12, 1–2, Ulpian mentions a rule excluding marriage between *sponsa* and the father or son of *sponsus*.

union illegal. It was Valentinian, Theodosius, and Arcadius who in A.D. 393 prohibited marriage with a deceased brother's wife or a deceased wife's sister.[1] There was no *conubium* with a step-daughter or a step-son; but the children of husband and wife by other marriages could intermarry, at any rate in the time of Justinian.[2]

The union of persons within prohibited degrees of relationship was null and incestuous. The punishment for incest appears at one time to have been the hurling of the offender from the Tarpeian Rock. It was a familiar school-controversy in the first century of the Empire whether a woman who survived the fall should be thrown down again.[3] Tacitus relates that this retribution was meted out by Tiberius to Sextus Marius,[4] but in the classical law the extreme penalty was usually deportation,[5] and this was imposed only in the more flagrant cases described as *incestus jure gentium*. Where the parties were only collaterally related and the bar proceeded from the civil law, the man might be let off with punishment as for adultery or less.[6] In such cases the woman went scot-free, if we are to believe Papinian in D. 48, 5, 39, 2. She was liable only in *incestus jure gentium*, that is for incest in the direct line,[7]

[1] C. 5, 5, 5. [2] G. 1, 63 and Inst. 1, 10, 8.

[3] Quintilian, *Inst.* 7, 8; Senec. *Controv.* 1, 3.

[4] Tac. *Ann.* 6, 19. Dio Cassius, 58, 22, says that both father and daughter were put to death, but does not specify the manner.

[5] Paul, *Sent.* 2, 26, 15.

[6] Paul, *Sent.* 2, 19, 5. D. 48, 5, 39, 3 (Papinian). 23, 2, 68 (Paul). 48, 5, 39, 7.

[7] D. 23, 2, 68. In *Sent.* 2, 26, 15, Paul says generally—'Incesti poenam . . . mulieri placuit remitti, hactenus tamen, quatenus lege Julia de adulteriis non apprehenditur'—but in view of the other texts this must be taken as referring only to *incestus jure civili*, which, of course, is not excused when it also constitutes adultery.

because she was presumed to know *jus gentium* but was not required to know *jus civile*.[1] But this defence cannot have availed against proof of guilty knowledge.[2]

The Christian Emperors imposed the death penalty, at least in certain cases of incest and for a time, but in the last state of the law the punishment was reduced to forfeiture of property.[3] In Osroene and Mesopotamia, however, incestuous marriages were so frequent that Justinian was driven to repressing them with the threat of death to both parties and their offspring.[4]

(*e*) Age and physical condition.

There could be no legal marriage at Rome between persons under the age of puberty. The male must be *pubes*, the female *viripotens*.[5] In the earliest law, however, it is impossible to speak of an 'age of puberty', since puberty was determined by actual inspection of the body. Out of respect for their modesty, this practice was at a remote period discontinued in the case of girls and the fixed age of twelve settled upon; but boys continued to be examined,[6] probably in connexion with the *tirocinium fori* when they assumed the dress and political privileges of men.[7]

Gaius[8] and the *Regulae*[9] mention a dispute between Sabinians and Proculians, the former insisting upon physical examination, the latter arguing that male puberty must be held to be attained on completion of

[1] Coll. 6, 3, 3—'remisso mulieri juris errore.'

[2] D. 48, 5, 39, pr.—2 and 7.

[3] C. Th. 3, 12, 1 and 2. C. 5, 5, 4 and 6; 8 and 9. Nov. 12, c. 1.

[4] Nov. 154. [5] Ulpian, *Reg.* 5, 2. Inst. 1, 10, pr.

[6] Serv. *in Aen.* 7, 53; *in Eclog.* 8, 40. Inst. 1, 22, pr. C. 5, 60, 3.

[7] See Rossbach, *Römische Ehe*, pp. 404–16, where the ages at which certain historical persons went through the ceremonies of *tirocinium* are recorded, and compare Ch. Lécrivain in Daremberg-Saglio sub v° *matrimonium*.

[8] 1, 196. [9] *Reg.* 11, 28.

the fourteenth year. A third view, that the boy must both have reached fourteen and possess the capacity of generation, was maintained by Priscus.[1]

It must have continued possible, up to the reign of Justinian, for a litigant disputing the puberty of his male opponent to have him physically examined. So long as the law had not indisputably declared itself in favour of an age-criterion alone, this would be the only sure way of settling the question. It is therefore inaccurate to speak of an 'age of puberty' for boys until A.D. 529, when Justinian abolished inspection as an indecency unworthy of the purity of his times and fixed upon the end of the fourteenth year.[2]

Where the other conditions of legal marriage are present, consorts who have begun to cohabit while one is still under the age of puberty are held to be married as from the date when that age is reached, provided always they are still together.[3]

The Julian laws specifically exempted men over sixty and women over fifty from the penalties of celibacy and childlessness. But the *senatusconsultum Pernicianum* or *Persicianum*, passed probably under Tiberius, made such persons liable if they had not satisfied the statutory requirements before reaching the specified ages. Subsequently a Claudian *senatusconsultum* enabled men over sixty to escape the *senatuscon-*

[1] Ulpian, *Reg.* 11, 28.

[2] C. 5, 60, 3. Inst. 1, 22, pr. Because both of these passages are under the heading of *tutela*, Collinet (N. R. H., 1900, pp. 368–71) thinks that it was only in the termination of guardianship that examination was excluded. I have rejected this conclusion for the reasons given by Girard, *Manuel*, 159, n. 3. In particular, C. 5, 4, 24 and Nov. 100, c. 2 are not satisfactorily interpreted as indicating fourteen merely as a minimum age with examination to be understood.

[3] D. 23, 2, 4.

sultum Pernicianum by marrying a woman under fifty. Finally a *senatusconsultum Calvisianum* declared that the marriage of a man under sixty with a woman over fifty, which it designated 'impar matrimonium', should not enable the consorts to accept inheritances, legacies (or dowries ?).[1]

This series of enactments appears to have been erroneously interpreted by later jurisprudence as prohibiting marriage with men over sixty and women over fifty. C. 5, 4, 27 describes such *nuptiae* as 'lege Julia vel Papia prohibitae'. In this constitution and again in C. 6, 58, 12, Justinian declares their full validity.

It is a curious fact, perhaps best left to the physiologists for explanation, that while the *castratus* was not capable of legal marriage, the *spado* was.[2] In regard to him Gaius was content, at least for the purpose of terminating *tutela*, to accept an arbitrarily fixed age of puberty, presumably fourteen.[3] We may therefore take it that the *spado* could marry at that age, although in the time of Gaius it was not yet settled law that a youth of merely retarded development could do so.

While the physical deficiencies of the *spado* were not a bar to marriage, the mental deficiencies of the *furiosus* were. Paul rests the difference on the necessity of consent, and points out that subsequent insanity does not annul a marriage validly concluded.[4]

II. Consent.

It is common to assume that in early Rome both *filius* and *filia* could be married off at the discretion of *paterfamilias* and without regard to their wishes.

[1] Ulpian, *Reg.* 16, 1 and 3–4. See also Jörs, *Verhältniss*, &c., pp. 10–13.
[2] D. 23, 3, 39, 1. For the same rule in adoption, see Inst. 1, 11, 9.
[3] G. 1, 196.
[4] D. 23, 2, 16, 2.

Girard[1] finds traces of the ancient system in the texts, as when Ulpian writes in *Reg.* 5, 2—'et utrique consentiant, si sui juris sunt, aut etiam parentes eorum, si in potestate sunt'—and when the praetor's edict (D. 3, 2, 1) leaves the *filius* and *filia* free of liability for a double betrothal or marriage contracted in obedience to the will of *paterfamilias* and punishes the *paterfamilias* only. Realizing, however, that these texts can be explained, the first as demanding the consent of *paterfamilias* in addition to that of the consort, the second as a concession to the moral duty of obedience, he depends more for his opinion upon the early omnipotence of the head of the family. Cuq[2] refers to the patriarch's duty to see to the perpetuation of his race, and cites Aulus Gellius, 2, 7, 18; Seneca, *Controv.* 2, 3, 2; Ulpian, D. 3, 2, 11, 4 as proving the original irrelevancy of the consent even of a *filius*. Of these sources, the first is nothing more than the record of a philosophical discussion with the conclusion that a son ought to marry the woman chosen by his father, provided she is of good character; the second is a statement by a young man that he has done so and subsequently repented; while the third is again a concession to the moral duty to obey. None of them proves a legal obligation, and the first at least tells rather against its existence.

It is nevertheless likely that in ancient Rome children were handled in this, as in some other respects, more or less like chattels. Provided they went through with the forms involved in *confarreatio* or *coemptio*—and for the latter their mere presence may have been all that was legally required—there would doubtless be little solicitude for their state of mind. Nor is there anything

[1] *Manuel*, p. 157, n. 3. [2] *Institutions juridiques*, p. 155.

to show that in the free marriage any greater measure of consent was at first required than that implied in the performance of *in domum deductio*.

On the other hand many texts purporting to express the classical law insist upon the consent of both consorts.[1] As far as *filius* is concerned, these can be accepted without difficulty: but serious doubt is entertained in some quarters whether the consent of a *filia* to her own marriage was really required before the fifth century. Mention has already been made of Solazzi's argument from the contrast of *filiam in matrimonium collocare*, *tradere*, *dare*, and *filium uxorem ducere pati*, and from the fact that a *paterfamilias* could for centuries dissolve a *filia*'s marriage against her will.[2] The difference of terminology is sufficiently explained by the fact that the girl—though, failing *manus*, she remains a member of her father's family—leaves his household for that of her husband. As for the father's power of divorce, that, if it proves anything, proves too much; for he had the same power in the case of a son *in potestate*.[3] The strongest apparent support for the doctrine expounded by Solazzi is C. 5, 4, 20, pr. (A.D. 408–9): 'In conjunctione filiarum in sacris positarum *patris* expectetur arbitrium: si sui juris puella sit intra quintum et vicesimum annum constituta, ipsius quoque exploretur adsensus.' But is the transaction under discussion here marriage itself, or merely the preliminary arrangement? To my mind it is solely the latter. The remainder of the text shows that the question throughout the constitution is who must be consulted by the parties seeking a match with a young woman. If

[1] Ulpian, *Reg.* 5, 2. D. 23, 2, 2; 16, 2; 22. 35, 1, 15. 50, 17, 30.

[2] See above, pp. 2–3.

[3] See below, pp. 239–41.

she is *in potestate* the suitor must win the approval of her *paterfamilias*; assuming the man to be a suitable person, her own concurrence can then be taken for granted or dispensed with at this stage of the proceedings.[1] On the other hand, where the maiden is *sui juris*, it is not sufficient to have the favour of her relatives or tutor or curator; she also must agree. If she modestly refuses to decide between several suitors and there is a difference of opinion between her normal advisers, a magistrate may be called upon to choose the most suitable husband.

C. 5, 4, 20, pr., therefore, does not disturb the authority of *Regulae* 5, 2, which lays it down generally that both parties must consent. The latter passage is not satisfactorily disposed of, as Solazzi admits,[2] by indicating the awkwardness of 'aut etiam'; and, although the *Regulae* are apparently not exclusively the work of Ulpian, the law stated here was probably in force at the end of the third or beginning of the fourth century, which brings us fairly close to the classical period.[3] The texts still warrant belief that in the time of Paul and Ulpian legal theory demanded at least the apparent concurrence of both parties to a transaction the essence of which was coming more and more to be regarded as precisely their *consensus*.[4]

I say 'legal theory' because it is clear from D. 23, 2, 21–2 that the real will in the matter might be that of *paterfamilias*. A *filiusfamilias*, we are told by Terentius Clemens, cannot be compelled to marry; but, says Celsus, if it is in fact only under paternal compulsion that he goes through with the celebration, the union is

[1] See above, pp. 2–4. [2] *Bull.* 34, 1925, pp. 6–7 and n. 2 on p. 7.
[3] See Fr. Schulz, *Die Epitome Ulpiani*, pp. 8–21.
[4] See below, pp. 93 et seq.

none the less valid. The rule as to consent, then, meant nothing more than that it was not possible to dispense with the participation of a *filius* who resolutely refused to accept a wife, or to apply to a magistrate to enforce such participation. There is still very little consideration even of his state of mind; and as the girl played the more passive part in the proceedings, and would ordinarily be less resistant to authority, the possibility of successful compulsion in her case must have been considerably greater. The head of the family would probably be content to depend upon his own influence to make a daughter act the necessary part of consenting bride. It is not surprising, then, that the question noticed by the jurists is whether a man can employ the machinery of the State to compel his son to take a wife. The answer of Clemens is in the negative,[1] and Diocletian repeats it in C. 5, 4, 12. But C. 5, 4, 14, in its natural and literal interpretation, goes a step further. The law it declares is that *no one* may be compelled to marry.

Over and above the consent of the immediate parties, that of their *paterfamilias* was indispensable.[2] And if *paterfamilias* was a grandfather having in his *potestas* the father of a grandson about to marry, the consent of such father must also be obtained.[3] This requirement was

[1] As is also that of Celsus (D. 23, 2, 22), whose 'inter invitos' is to be noticed as evidence that stubborn resistance on the female side also would prevent celebration.

[2] D. 23, 2, 2.

[3] D. 23, 2, 16, 1. Consent of the father alone was sufficient if the grandfather was mad—D. 23, 2, 9, pr. In D. 23, 2, 3, Paul declares that for the marriage of cousins in the *potestas* of the same grandfather, the authorization of the latter was alone required. Is this an exception to the rule that the consent of a *pater* in the same *potestas* must be asked? Moriaud (Mélanges Girard, 2, 304) thinks so. I see no justification for an

probably a result of the *manus* marriage, being a further inference from the rule 'nemini invito heres suus adgnascitur' as appears from the fact that it did not exist in the case of the granddaughter. It survived in the free marriage where no agnatic connexion was established between the bride and her husband's family.

It is often said[1] that when the *manus* marriage had gone out of use there was a difference in the consent required by a *filius* and that required by a *filia*. The former must have positive approval; in regard to the latter absence of opposition was all that was asked.[2] For the reason of such a distinction it would be unnecessary to go farther than the relative effect of the son's or daughter's marriage upon the structure and eventual obligations of the *pater*'s household. The difference—if we could admit its existence—would explain why there was doubt as to whether a son *in potestate* could marry at all if his *paterfamilias* chanced

exception and understand the text in the alternative sense rejected by Moriaud, viz., as a simple contrast with the normal situation where some other person would consent to the woman's marriage and there would accordingly be two consenting *patresfamilias*.

[1] See, for example, Rossbach, *Römische Ehe*, p. 395, and Karlowa, *Röm. Rg.*, 2, 174.

[2] C. 5, 4, 25, pr. 2. Cf. D. 23, 1, 7, 1. These are the two most pertinent texts; nothing can be argued from the 'sine voluntate' of D. 23, 2, 35, as implying necessity of positive consent to the son's marriage, for the same expression is used by Paul, *Sent.* 2, 19, 2, of all persons *in potestate*. In D. 23, 2, 34, pr., Papinian declares that a general permission to marry is not sufficient for a *filiafamilias*; her *pater* must know who the man of her choice is when he consents. Papinian may have been one of the minority who believed specific consent for *filiafamilias* necessary, but the passage does not prove this contention. It would merely be necessary, if any question arose, to show that *pater*, knowing the man and aware of the marriage, had raised no objection. Cf. Paul in D. 1, 5, 11.

to be mad. A lunatic is incapable of consent. He is also incapable of legal opposition,[1] and his daughter may therefore marry. The doubt was not apparently removed by the constitution of Marcus mentioned in C. 5, 4, 25, 2, though the difficulty in bringing *furiosi* under the 'mente capti' of the constitution is not easy for us to understand. At the worst the argument *a fortiori* should have decided the question. At any rate, Justinian finally clears up this point in the constitution reproduced in C. 5, 4, 25, and referred to in the Institutes, 1, 10, pr. The son of a *furiosus* is declared as free to marry without consent as his daughter, the marriage settlement to be arranged by the curator of the *furiosus* with magisterial approval.

There is no doubt a strong suggestion in D. 23, 1, 7, 1 and C. 5, 4, 25, pr.–2 that something more than non-opposition was necessary for the validity of a son's marriage. But even for a daughter, Papinian in D. 23, 2, 34, pr. demands knowledge of the man and the marriage on the part of *paterfamilias*. This seems to mean that for her also a positive consent was essential, though it might be tacit. We cannot say with confidence that anything more than this was required in the case of a son. There are two texts which bear most naturally the interpretation that tacit consent was sufficient. Thus in F. V. 102 all that there is to indicate the paternal blessing is that after his return from absence *paterfamilias* made no effort to break up his son's household; while in C. 5, 4, 5 Alexander assures a

[1] For a parallel case, where a mad daughter's consent is presumed because she cannot object, see D. 24, 3, 2, 2. It does not follow that where a positive consent, as opposed to mere absence of objection, is required, such consent will be presumed to be given by a *furiosus*.

woman that she need have no fear that the *paterfamilias* of her former husband, having known of the marriage and made no protest, will not recognize his grandson. Probably the true conclusion is that there was in all cases a presumption of consent, even an irrebuttable presumption, where a parent acquainted with the facts did not take the opportunity to protest; for it is difficult to draw any substantial distinction between a positive consent which may be tacit and an absence of opposition which must be accompanied by knowledge.

For a *manus* marriage at any rate the *filiafilias* needed the positive consent of her *pater*. Nothing less was to be expected in view of her exit from his *potestas* and the breaking off of all agnatic connexion with him and his family. But the form of *coemptio* and the incapacity of *filiafamilias* necessitated active participation by *paterfamilias*, a fact which of itself adequately explains why mere non-opposition was here insufficient.[1] For the same reason, *conventio in manum* by a woman *sui juris* was valid only when accomplished with the participation of her guardian,[2] whereas she could enter into a free marriage without his assent.[3] A tutor would of course

[1] *Coll.* 4, 2, 3 and 4, 7. [2] Cicero, *pro Flacco*, 34, 84. Gaius, 1, 195 a.
[3] Cf. Esmein, *Mélanges*, p. 14. Contra Girard, *Manuel*, 164, n. 1, citing Livy, 4, 9 (*infra*, p. 61). Livy does mention the tutor but refers to a marriage in Latium, not at Rome, and that in 443 B.C., only seven years later than the XII Tables, when, according to Girard, there was probably not yet any marriage without *manus*. Ulpian, *Reg.* 11, 22, his principal authority, seems to me to refer to proprietary arrangements accompanying the marriage, not to the marriage itself, particularly as the text has just spoken of 'tutor . . . ad dotem dandam dicendam promittendamve . . .' In favour of the view taken by Esmein may be cited the terms of the *senatusconsultum* reproduced by Paul, D. 23, 2, 20: 'nubere autem pupilla suo arbitrio potest'. Of course the immediate subject there is the non-intervention of the curator, but 'suo arbitrio' is

usually be consulted, if only to make sure of his *auctoritas* for the constitution of a dowry.[1] And apparently a mother and other near relatives had something to say in the matter, could indeed appeal to a magistrate when they disagreed with the tutor as to the respective merits of suitors. Such a dispute is reported by Livy to have occurred at Ardea as early as 443 B.C., when the magistrate decided in favour of the parents.[2] Two constitutions of the late empire refer again to differences respecting the choice of a husband,[3] and from the first of these it appears that under the age of twenty-five even a widow was bound to consult her relatives, in particular her father, before remarrying. At the same time it is made clear that, as between two suitors of equal merit, the will of the woman was decisive.

As far as the emancipated or fatherless daughter under twenty-five is concerned, all that can be safely inferred from the above-mentioned texts is that a

strong language for an action requiring even the formal assistance of a tutor. Add to this that marriage does not figure among the acts for which the woman required *auctoritas* enumerated in *Reg.* 11, 27, or by Gaius in 1, 192. Girard's argument that the mention of the tutor in the constitution of Severus and Caracalla, C. 5, 4, 1, can only be explained by the transition from the old law requiring the tutor's *auctoritas* to a new system which did not, has little force when confronted with Cicero, *pro Flacco*, 34, where Valeria and Andro are undoubtedly regarded as married in spite of the fact that one tutor, Flaccus, has not intervened with his *auctoritas*. If Flaccus had indeed given his *auctoritas* for a marriage, but not for a subsequent *coemptio*, Cicero would have been at more pains to make the distinction. Finally, the *Institutes* of Justinian, 1, 10, pr., though they deal at some length with paternal consent among the conditions of marriage, contain no mention of tutorial *auctoritas*. The same is true of Ulpian, *Reg.* 5, 2, where the silence as to *tutores* is even more striking : 'et utrique consentiant, si sui juris sunt, aut etiam parentes eorum si in potestate sunt.'

[1] Cf. C. 5, 4, 1. [2] Livy 4, 9. [3] C. 5, 4, 18 and 20.

parent or other close relative and possibly even a tutor[1] could, for sufficient reason demonstrated to a magistrate, prevent a marriage from taking place. It would be going too far to suppose that a marriage contracted without reference to such parents but without manifested opposition on their part was void. To do so would be to put the power of the father over an emancipated daughter or of a mother over a fatherless girl higher than that of a father over the daughter *in potestate*. For, as we have seen, the free marriage could be validly concluded in the mere absence of objection by the bride's *paterfamilias* provided he knew the circumstances.

A union entered into against the will or without the knowledge of *paterfamilias* was null.[2] The only passage that may raise any question as to this is Paul, *Sent.* 2, 19, 2, where we are told: 'Eorum qui in potestate patris sunt sine voluntate ejus matrimonia jure non contrahuntur, sed contracta non solvuntur; contemplatio enim publicae utilitatis privatorum commodis praefertur.' But in view of the other texts this must be interpreted as meaning merely that a marriage contracted with the express or tacit consent of *paterfamilias* is not annulled by the subsequent signification of his disapproval, and cannot indeed, since the Antonines, be dissolved at his discretion.[3]

[1] C. 5, 4, 1.

[2] Paul in D. 1, 5, 11. 23, 2, 2. Inst. 1, 10, pr. Papinian in D. 23, 2, 35. Modestinus in D. 23, 2, 25.

[3] Cf. Brini, *Matrimonio*, 3, pp. 141–3, where will also be found an examination of alternative interpretations by Voigt and Huschke. The former holds that where marriage has taken place without paternal consent, as in cases of absence, captivity, or madness, the *paterfamilias* cannot subsequently dissolve it because he disapproves. This is possible,

The consent of a *paterfamilias* who had fallen captive was dispensed with. The texts appearing in the Digest on this subject under the names of Paul[1] and Ulpian[2] require a delay of three years. On the other hand, Julian is represented as saying that the marriage may be celebrated before the expiry of this period provided the chosen bride or husband is one to whom no reasonable objection could be taken,[3] and Tryphoninus in D. 49, 15, 12, 3, permits the son of a captive father to marry without mention of any delay. The last-mentioned text is taken as proof that the three-year delay was inserted by the compilers and that Justinian first enacted it.[4]

Where the *paterfamilias* merely disappears and is not known to be in captivity, the law is less certain. True, Paul appears to lay down the same rule for absence in D. 23, 2, 10, and Julian contemplates both contingencies in D. 23, 2, 11; but probably only the first eleven words in the first text belong to Paul, while the second passage is full of interpolations which may include the 'vel absit'. In F. V. 102, Paul gives the details of a case where an absent *paterfamilias* returns, and the account makes it appear that the son's union, celebrated before the return, only becomes 'matrimonium' by the subsequent tacit consent of his father. Unless the absence here is not such that 'ignoretur ubi sit et an sit', the fragment goes some way towards proving that D. 23, 2,

though absence is probably not a circumstance dispensing with consent. Huschke's 'et contracta non solvuntur' presupposes paternal consent for divorce, and is untenable. See below, p. 239. Solazzi, *Bull.* 34, 1925, p. 9, holds that from 'sed contracta' on, the passage should not be ascribed to Paul.

[1] D. 23, 2, 10. [2] D. 23, 2, 9, 1. [3] D. 23, 2, 11.

[4] Girard, *Manuel*, 158, n. 2. Levy, *Verschollenheit*, pp. 180–1.

10–11 was altered to conform with legislation by Justinian which, while it made the child of the captive wait three years for freedom to marry as he chose, gave to the child of the absentee, after the same delay, a liberty which he had not previously enjoyed until the absentee was presumed dead.[1]

A passage from Marcian's *Institutes*, D. 23, 2, 19, which assuredly stands in need of considerable restoration, appears to provide generally that a father unjustly withholding consent may be compelled to allow a child to marry. In his contribution to the *Mélanges Girard* (2, 291 et seq.) where he proposes a much altered reading, Moriaud emphasizes the anomalous character of an enactment enabling a son to overcome the objections of a sane *paterfamilias* in a period when no certain means existed for proceeding without the consent of one who was mad. He accordingly proposes to limit the terms of the *lex Julia* to female descendants by substituting 'filias neptesve quas' for 'liberos quos', finding further and more cogent reason for doing so in the fact that the subsequent 'in matrimonium collocare' and 'dotare' can properly refer to such descendants only. He consequently drops 'ducere uxores vel', and to solve the problem of the relation of the *constitutio divorum Severi et Antonini* to the *lex Julia*, inserts 'per praetorem urbanum, vel' after 'dare non volunt'. The differences between the original thus reconstructed and the text appearing in the Digest are explained as alterations made by the compilers in order to bring the passage into conformity with the existing law—which did not allow this compulsion of *paterfamilias* even in regard to a son's marriage—followed by imperfect copying.

[1] See Levy, op. cit., pp. 159 and 180–1.

The text has undoubtedly been tampered with, as is shown by the clumsy combination of *lex Julia* and the *constitutio*. But this points more clearly to omissions than to alterations. The same may be said in explanation of the fact that the subsequent language must have been used originally in sole reference to the marriage of female descendants. The other arguments adduced by Moriaud are weighty but not quite convincing, as he himself admits. In the first place there is at least a possibility of exacting consent from a sane man, whereas it is legally impossible for a lunatic to consent to anything. Secondly, we have no definite statement anywhere that the marriage of a lunatic's son was invalid, merely that the jurists had some doubts as to its validity. In practice the consent of a mad *paterfamilias* may commonly have been dispensed with[1] without authoritative decision having been taken as to the legality of this proceeding, though it appears from C. 5, 4, 25, 2 that, to make quite certain, application was sometimes made for the Emperor's sanction. The decision of Justinian (C. 5, 4, 25) expressly purports to put an end to doubt, not to change the law. Moriaud's argument from the principle *nemini invito heres suus agnascitur* is weak. The marriage is free, the wife does not become *sua* and the eventual children are not *sui* so long as the *filius* remains *in potestate*. In D. 49, 15, 12, 3, Tryphoninus is speaking of the return of a captive whose son has died in his absence, leaving the grandchild *suus heres*. Finally, D. 23, 4, 8—'Quotiens patre furente vel ab hostibus capto filiusfamilias ducit uxorem filiaque

[1] It has already been pointed out, *supra*, p. 57, n. 3, that the consent of an insane grandfather having *potestas* was dispensed with, that of the father alone being sufficient.

familias nubit . . .'—shows that Paul at least was not even in doubt.

There is, then, no real incompatibility in the co-existence of a rule that a sane but unreasonable and capricious *paterfamilias* may be constrained to consent, and of juristic doubt whether the *filius* of a lunatic may validly marry at all. The *lex Julia*, therefore, which admittedly enabled the daughter to overcome unreasonable paternal opposition, may have provided the same facilities for the son. It was after all a law for the encouragement of matrimony, and the arbitrary control over a son's matrimonial plans must have been at least as frequent an obstacle to legitimate union as interference with those of a daughter. The case for transporting the rule in the son's case to a point more than five centuries later is not made out.

We have seen that the emancipated daughter was still bound to defer to reasonable objection on the part of her father, and that when her father was dead she could be restrained to a certain extent by her surviving elders or even by a tutor. This was probably true whatever her age before the abolition of perpetual guardianship; but thereafter any right of interference apparently ceased when she had reached full majority, namely twenty-five years.[1] On the other hand, the emancipated son never needed the consent even of his father.[2] With him there was no question of tutorial concurrence, for by the time he became capable of marriage he had ceased to have a tutor. As for the curator who at the end of the classical period regularly undertook or supervised the economic and financial administration of the minor between fourteen and

[1] Cf. C. 5, 4, 18 and 20.

[2] D. 23, 2, 25.

twenty-five, his functions related to property, not to the person. The constitution of Gordian at C. 5, 4, 8, which refers to males only below twenty-five,[1] declares that neither a curator nor any relative may intervene. If this is true of the emancipated son whose father is still alive, it is *a fortiori* true of the minor rendered *sui juris* by his father's death.

[1] If it had been understood as referring also to females, it could not have been left standing in open contradiction with C. 5, 4, 1. 5, 4, 18. 5, 4, 20.

CHAPTER III

THE FORMS OF MARRIAGE

FROM the legal point of view, marriage in the classical period of Roman law is almost, if not entirely, a formless transaction. That is sufficient explanation of the fact that so little is to be found in the juristic writings on the subject of forms. The religious or secular ceremonies celebrating the union have been described in non-juristic literature and in statuary with enough detail to permit vivid reconstruction. But these ceremonies were in great part legally indifferent; the validity of the marriage did not, except to a limited degree in *confarreatio*, depend upon their observance.

Yet there is every reason to believe that in early Republican times much more than consent and *in domum deductio* was necessary to constitute a lawful marriage. It is now generally assumed, and on good grounds, that the original Roman marriage always involved *manus* over the wife, while the marriage without *manus*, the so-called free marriage, was of comparatively late development.[1] If that is so, and if *manus* occurred only as between husband and wife—the *coemptio fiduciae causa cum extraneo* of Gaius 1, 114–23 being obviously a juristic device of subsequent invention—then we have grounds for believing that marriage and *manus* were originally not distinct concepts but one and the same, and that the legal forms of marriage were identical with the forms for the creation of *manus*. Of these the best account, brief as it is, is that given by Gaius in 1, 111–13. Three institutions are there described

[1] Cf. Bonfante, *Corso*, 1, p. 42.

in the following order, *usus*, *confarreatio*, and *coemptio*. Nothing is said there, or elsewhere in the Roman records, as to the comparative antiquity of these forms, and there is no reason for supposing that Gaius treats them in chronological order.[1] Only one indication as to age is given—that is the statement that the XII Tables provided for the interruption of *usus* by *trinoctio abesse*.

The innumerable attempts to determine which was the oldest form of Roman marriage and why and when the others were added are mere speculations in probabilities. Nothing approaching conclusive evidence on the matter has yet been discovered. One view commonly held is that *confarreatio*, limited to patricians, was the only legal marriage in the period when none but a patrician was a citizen, that *coemptio* was a juristic invention for the benefit of the plebs when it acquired civil and political rights, while *usus* was a development from *coemptio* in which usucapion took the place of the conveyance *per aes et libram*.[2] Those who hold this view are able to point to the primitive nature of the sacrifice employed in *confarreatio*, and to the fact that Dionysius of Halicarnassus, when he speaks of marriage under the kings, mentions only sacred marriage, laws regarding which he attributes to Romulus and Numa.[3] Another opinion with perhaps as many adherents accepts *coemptio* as the survival of that primitive marriage by real sale which was common to all the Indo-European race. To make the union complete, religious observances may necessarily have followed at a

[1] Contra Westrup, Z. V. R. 42, p. 54.

[2] See for example Karlowa, *Röm. Rg.* 2, 164 et seq.

[3] 2, 25 and 27, reproduced in Girard, *Textes*, pp. 5 and 7.

very early stage, but the recognition of valid marriage without sale on the performance of a special religious ceremony—in other words, *confarreatio*—was of later development, as was also *usus*.[1] This doctrine commends itself strongly by preserving an unbroken link between primitive and historic-Roman marriage, thus avoiding the assumption of a skilful juristic invention, prior to the XII Tables, at a time when the manifestation of conscious legal ingenuity must be regarded as an improbable phenonemon.[2]

More speculative still are the efforts to assign the various forms of marriage to the different racial elements in the composition of the Roman people. Equally cogent reasons have been advanced for regarding *confarreatio* as (*a*) of Etruscan and (*b*) of Sabine origin, while *coemptio* and *usus* have been attributed now to the Latins and now to the Etruscans. Here again the balance of probability seems in favour of Rossbach's opinion[3] that marriage was common in form among the different Italian races, all of which may have practised a more strictly formalistic and religious

[1] See e.g. Rossbach, *Römische Ehe*, especially pages 156–61 and 237–52.

[2] Westrup, whose article *Über den sogenannten Brautkauf des Altertums*, Z. V. R. 42, 1927, pp. 47–145, appeared after the above was written, is inclined to regard *usus*, *confarreatio*, *coemptio* as the chronological order. He nevertheless believes that *coemptio*, corresponding to the old Aryan bride-purchase, was used as a form of marriage by the Roman plebeians. It was gradually displaced by consensual marriage, but continued to be used, not as a form of marriage, but as a form for the acquisition of *manus* after the *lex Canuleia* (445 B.C.), or some other enactment of about that time, gave the *plebs* the right to acquire *manus* and *patria potestas* without giving them the right to employ *confarreatio*. This is ingenious, but has little more to commend it than earlier conjectures.

[3] Op. cit., pp. 162–252.

marriage limited to a patrician class, and a more secular, less solemn marriage available for the people as a whole.

Fruitless as it is, then, to attempt to ascertain the precise position of each in the historical development of the Roman law of marriage, some attention must be paid to the differentiation of *confarreatio*, *coemptio*, and *usus*, because enough authentic information has survived to show them operating as three distinct institutions with profoundly different legal effects. They will be treated here simply in the order of their solemnity.

I. *Confarreatio.*

Gaius 1, 112 runs as follows:

'Farreo in manu*m* conveniunt per quoddam genus sacrificii quod Jovi Farreo fit; in quo farreus panis adhibetur, unde etiam con*farre*atio dicitur; conplura praeterea hujus juris ordinandi gratia cum certis et sollemnibus verbis, praesentibus decem testibus, aguntur et fiunt. Quo*d* jus etiam nostris temporibus in usu est; nam flamines majores, id est Diales Martiales Quirinale*s*, item reges sacrorum, nisi ex farreatis nati non leguntur: ac ne ipsi quidem sine confarreatione sacerdotium habere possunt.'

Regulae, 9, has a brief mention of this priestly marriage as the sole note under the rubric 'De His Qui in Manu Sunt'.

'Farreo convenitur in manum certis verbis et testibus X praesentibus et sollemni sacrificio facto, in quo panis quoque farreus adhibetur.'

To these we must add Servius, *in Georg.* 1, 31: 'farre, cum per pontificem maximum et Dialem flaminem per fruges et molam salsam conjungebantur—

unde confarreatio appellabatur—ex quibus nuptiis patrimi et matrimi nascebantur;' *in Aen.* 4, 103: 'quid est enim aliud ("permittere) dextrae", quam in manum convenire? quae conventio eo ritu perficitur, ut aqua et igni adhibitis, duobus maximis elementis, natura conjuncta habeatur: quae res ad farreatas nuptias pertinet, quibus flaminem et flaminicam jure pontificio in matrimonium necesse est convenire;' *in Aen.* 4, 374: 'mos enim apud veteres fuit, flamini ac flaminicae, dum per confarreationem in nuptias convenirent, sellas duas jugatas ovilla pelle superinjecta poni ejus ovis, quae hostia fuisset, ut ibi nubentes velatis capitibus in confarreatione flamen ac flaminica residerent.'[1]

A few other references to *confarreatio* occur in literary texts; the above constitute, however, much the most important sources, and are sufficient to depict the main elements of the ceremony. The regrettably reticent notices of Gaius and the *Regulae* are considerably, if not quite adequately, supplemented by the observations of Servius. But, though we thus obtain some inkling of what Gaius means by *conplura praeterea . . . aguntur et fiunt*, we remain in the dark as to what the *certa et sollemnia verba* were.

There is in any case a sacrifice to Jupiter,[2] consisting of a sheep, bread of spelt (*farreus panis*), fruits, and salt

[1] Texts from Thilo's *Servius*, 1881–7. They are reproduced, but in abridged form, in Bruns, *Fontes*, 7th ed., 1909, *Scriptores*, pp. 75–9.

[2] Warde Fowler, *Journal of Roman Studies*, 6, 1916, pp. 189–90. Rossbach, writing before the complete restoration of G. 1, 112, held that the sacrifice was addressed to the tellurian divinities, Ceres, Tellus, Juno, and Mars Picumnus, who were the deities of marriage (op. cit., p. 102). He is therefore at some difficulty to explain the presence of the flamen Dialis, and limits it to marriages of candidates for that priesthood (p. 125).

cake (*mola salsa*). Whether all these articles were offered exclusively to the god, or some at least partaken of by the celebrants, is not clear. The officiating priests are the *pontifex maximus*, whose presence emphasizes the solemnity and importance of the institution, and the *flamen Dialis*, the priest of Jupiter. The right hands of bride and groom are joined and they are made to sit on two joined chairs over which is thrown the fleece of the sacrificed sheep.[1] A fixed formula of ritualistic words is pronounced, but whether by the priests or by the parties does not appear. Rossbach thinks that they were prayers offered by the parties for a blessing on their union;[2] Karlowa, that they signified the legally necessary assent of bride and groom.[3] But if the latter opinion were correct, surely Gaius, even in his brief description, would have found place for an element so important from the legal point of view.

In two passages—*in Aen.* 4, 103, quoted above, and 4, 339[4]—Servius connects a use of fire and water with *confarreatio*, and Karlowa[5] argues that there was some interchange of fire and water between bride and groom in the actual place of sacrifice.[6] Varro, however, states (*de Lingua Latina*, 5, 61) that this formality took place on a threshold, and, if we compare Scaevola, D. 24, 1, 66, 1, we can scarcely doubt that the *limen* meant is

[1] Fowler, op. cit., pp. 193–5, thinks that the two *sellae* and the sheepskin were peculiar to a specially solemn form of *confarreatio* required of *flamen* and *flaminica*.

[2] *Römische Ehe*, p. 111. [3] *Röm. Rg.* 2, 156.

[4] 'Et "taedas" quidem quantum ad ignem pertinet, per quem mos confarreationis firmabatur' . . .

[5] Op. cit., 2, 157.

[6] Which he considers to have been the *curia*, while Rossbach places that part of the ceremony in the bride's home.

that of the bridegroom.[1] In the marriage ceremony which continued to be used even when there was scarcely ever any but marriage without *manus*, the wife was received into the matrimonial domicile with fire and water. That seems the natural place for such a formality, symbolizing as it did complete participation in the household life of the husband.

The reception with fire and water appears to have been a commonplace of the formal *in domum deductio* which was usual, if not necessary, in any form of marriage. Another such commonplace[2] was the dialogue that took place before the bridegroom's threshold was crossed. To his question—'Quaenam vocaris?'—she replies, 'Ubi tu Gaius, ego Gaia'. This usage, attested for the *coemptio* marriage by Cicero, *pro Murena*, 12, 27, is connected with *confarreatio* by Quintilian, 1, 7, 28: 'Quia tam Cajas esse vocitatas quam Cajos etiam ex nuptialibus sacris apparet.' Whether it betokens the assumption of the husband's gentile name, as Mommsen states,[3] or of his *praenomen*, as Karlowa[4] argues, referring in the first view to the bride's entry into her husband's *gens*, in the second to her subjection to his personal *manus*; or whether, as Rossbach[5] thinks, it symbolizes her entry into the husband's household as mistress where he is master, must remain an unsolved problem, of little legal im-

[1] See also Servius, *in Aen.* 4, 167.

[2] Mommsen thinks it probably limited to marriage with *manus*. *Römische Forschungen*, p. 12, n. 10. So also Becker, *Gallus*, 2, 19, who attributes to it the first meaning stated by Plutarch, Q. R. 30.

[3] Ibid. 1, 7 et seq.

[4] *Röm. Rg.* 2, 157–8.

[5] *Römische Ehe*, p. 353 et seq. He adopts, with etymological reasoning, the view first stated by Plutarch in *Q. R.* 30.

portance.[1] The entry into *manus*, family, and *gens* is sufficiently attested by other and direct sources.

The ritual of *confarreatio* must be performed, according to Gaius, 1, 112, in the presence of ten witnesses. The number has without much justification been associated with the doubtful division of the *curia* into ten *gentes*, or alternately with the established division of the tribe into ten *curiae*. It probably signifies nothing more than the intention to make the ceremony of *confarreatio* a solemn and public transaction. No doubt this purpose would be well served by a representative, say, of each *curia* in the man's tribe, to which the woman henceforward belonged; but none of the writers who comment on *confarreatio* says so.

The above are the formalities associated by Roman literary and juristic writers with *confarreatio*. Unfortunately the lack of precision in the mentions of Gaius and Ulpian leaves us uncertain as to how many of them were essential to validity. Obviously the sacrifice to Jupiter, the ten witnesses, and the presence of the *pontifex* and *flamen Dialis* belong to the essence of the transaction, but some doubt may be felt as to the various items making up Gaius' 'conplura praeterea'. That it continued to be a highly elaborate proceeding is clear from Tacitus, *Annals*, 4, 16. We are told in that passage that its *caerimoniae difficultates* still disinclined people to employ it.

The very nature of the ceremony makes it safe to assume that *confarreatio* was long, if not always, confined to the patrician class; though here again there is nothing that may truly be described as direct authority. It

[1] For other references to the dialogue, see Val. Max. 10 *in fine* and Cicero, *pro Murena*, 12.

would have been entirely out of character in early Rome to invest any plebeian union with so much pomp and circumstance. There was indeed, as Karlowa points out,[1] no public *communio sacrorum* between patricians and plebeians, a fact which in itself must have excluded the plebs from the sacrifice administered under supervision of *pontifex maximus* by the *flamen Dialis*. But when, at the end of the fourth century B.C., the plebs had so far attained religious equality as to be eligible to the college of pontiffs and augurs, and when intermarriage between the orders was of everyday occurrence, *confarreatio* may well have been open to those plebeians who wished to marry in that way. In our most substantial records, it is true, *confarreatio* is always associated with the *flamines*; and Gaius, in the passage cited above, declares it a necessary condition for election as *rex sacrorum*, *flamen Dialis*, *Martialis*, or *Quirinalis*, that the candidate should be born of such marriage and should himself marry by *confarreatio*. All four of these priestly offices were open only to patricians. It would be an obvious fallacy to argue from that to the exclusion of the *plebs* from this form of marriage, and the fact ceases to be as suggestive as at first sight it appears when we remember that the two colleges of the Salii, which are not included in Gaius' list or mentioned elsewhere in connexion with *confarreatio*, were also limited to patricians. The passage of Suetonius, *Julius*, 1—'sequentibus consulibus flamen Dialis destinatus, dimissa Cossutia, quae familia equestri sed admodum dives praetextato desponsata fuerat, Corneliam Cinnae quater consulis filiam duxit uxorem'—cited by Rossbach,[2] may be explained by the hypothesis that

[1] *Röm. Rg.* 2, 165.

[2] *Römische Ehe*, p. 96.

a marriage by *confarreatio* was not possible with a woman of non-patrician family; but it may also be explained in a number of other ways.[1] Nor, finally, is the failure to mention *confarreatio* in *pro Flacco*, 34, more conclusive. True, Cicero there has to prove that Valeria was not *in manu* to her husband, Andro. He shows that neither *usus* nor *coemptio* had taken place, but says nothing of *confarreatio*, an omission due, it is said, to the fact that there could be no question of *confarreatio* in connexion with these two non-patricians. It is equally probable that this form of marriage was already resorted to solely as qualification for the higher priesthoods, and that it could be taken for granted that no ordinary citizen had been married in this way.[2]

Tacitus in the *Annals*, 4, 16, relates how Tiberius, impelled by the scarcity of persons eligible for the priesthood of Jupiter—a scarcity partly attributed to the elaborate formalities of *confarreatio* and to the fact that it involved submission to the husband's *manus*—passed a law to the effect that the *flaminica Dialis* should come under her husband's 'potestas' only in so far as religious rites were concerned, remaining for other purposes in the same position as the wife in a free marriage. The text refers specifically and solely to the marriage of *flamen Dialis*, nor can Gaius, 1, 136, a mutilated passage restored precisely on the authority of

[1] e.g. Cossutia's parents were probably not married by *confarreatio*, by this time rare. To infer that she could not become *flaminica* because, her parents not being patrician, she was not born of *confarreatio*, is of course a *petitio principi*, from which Rossbach's paragraph is not quite clear.

[2] Cf. Boethius, *in Topica*, 2, 3, 14: 'sed confarreatio solis pontificibus conveniebat.' Boethius uses 'pontifices' for priests in general. Text from Bruns, *Fontes, Scriptores*, p. 73.

this note in the Annals, carry us any farther. The opinion that the law included or was extended by interpretation to include the *confarreatio* required of the other religious officials already enumerated is based on nothing more than a very plausible conjecture.

Thus limited for the *flamen Dialis* and possibly also for *Martialis*, *Quirinalis*, and *rex sacrorum*, *confarreatio* was still in use in the second century A.D.,[1] and at the end of the third century.[2] It may indeed have continued so long as these priesthoods were maintained, and it was not until A.D. 394 that Theodosius abolished the pagan sacrifices.[3]

II. *Coemptio.*

Gaius, 1, 113: 'Coemptione vero in manum conveniunt per mancipationem, *id est* per quandam imaginariam venditionem; nam adhibitis non minus quam V testibus civibus Romanis puberibus, item libripende, emit *vir* mulierem, cujus in manum convenit.'

1, 123: '*illa* quidem, quae coemptionem fac*it non* de*ducitur in* servilem conditionem; *at a parentibus et a coemptionatoribus* mancipati mancipataeve servorum loco constituuntur. . . . Sed differentiae ratio manifesta est, cum a parentibus et a coemptionatoribus isdem verbis mancipio accipiantur, quibus servi; quod non similiter *fit* in coemptione.

Boethius, *Topica*, 3: Coemptio vero certis sollemnitatibus peragebatur, et sese in coemendo invicem interro-

[1] G. 1, 112.

[2] Ulpian, *Reg.* 9. There is also an inscription (C. L. I. 10, 6662) later than the accession of Commodus, which mentions a priesthood *confarreationum et diffarreationum.* Reproduced Rossbach, op. cit., pp. 119–20.

[3] Zosimus, 4, 59, cited by Rossbach, op. cit., p. 100, as the abolition of the flaminates.

gabant, vir ita: an sibi mulier materfamilias esse vellet? Illa respondebat velle. Item mulier interrogabat: an vir sibi paterfamilias esse vellet? Ille respondebat velle. . . . Quam sollemnitatem in suis institutis Ulpianus exponit.[1]

In its essentials, the marriage by *coemptio* is the familiar conveyance per *aes et libram*. From the legal point of view this conveyance, accompanied by the appropriate words denoting its object, was sufficient. Given proper evidence that it had occurred, there was no question but that the pair were man and wife, united in a *matrimonium justum*.[2] That at least is the position in historical times. There may well have been a stage between the marriage by simple sale and the fictitious transaction of our records when, to constitute lawful marriage, *coemptio* had to be preceded and followed by religious observances. It seems clear that in the age of Cicero[3] all forms of marriage were accompanied by prayers and sacrifice, however cursory, relics of a stage when no distinction had yet arisen between sacred and civil law, between *fas* and *jus*, and when the idea of this most important union between man and woman validly taking place without the intervention of the gods had doubtless not been suggested.[4]

[1] Text from Bruns, *Fontes, Scriptores*, pp. 73–4.

[2] I take it that the *coemptio fiduciae causa* of Gaius, 1, 114–23, must have been distinguished by special words, perhaps 'fiduciae causa' and nothing more, used by the purchaser.

[3] *De divin.* 1, 16, 28. 'Nihil fere quondam majoris rei nisi auspicato ne privatim quidem gerebatur, quod etiam nunc nuptiarum auspices declarant, qui re omissa nomen tantum tenent. Nam ut nunc extis, (quamquam id ipsum aliquanto minus quam olim), sic tum avibus magnae res impetriri solebant.' Val. Max. 2, 1, 1. Cf. Servius, *in Aen.* 3, 136: 'apud veteres neque uxor duci neque ager arari sine sacrificiis peractis poterat.'

[4] The converse was probably also true, viz., that *coemptio*, the element

In the reading of Gaius given above, the transaction appears simply as a feigned purchase of the wife by the husband. But Servius, *in Georg.* 1, 31, and after him Isidore of Seville, *Origines*, 5, 24, 26,[1] describe it as a mutual conveyance, the wife also purchasing the husband—a description which is incompatible at once with the character of the institution as a survival of the primitive real sale of the woman and with the position assigned to the husband as titulary of *manus*. What could a purchase of the man by the woman signify if not the acquisition of some power over him? In fact her situation was much less independent, much more subordinate, than in the free marriage where no conveyance took place. Servius, writing at the end of the fourth century when, to use his own words, *coemptio* 'ad antiquum nuptiarum pertinet ritum', was doubtless misled by expressions like 'po*test* autem coemptionem facere mulier non solum cum marito suo',[2] may even have misinterpreted the passage of Ulpian reported by Boethius, *Topica*, 3, with its mutual interrogations, or have attached special and erroneous significance to the prefix *co-* in the name of the transaction.[3] At any rate the view that there was a mutual fictitious purchase, held so recently as by Huschke when he restored the MS. reading 'emit eum mulierem' of Gaius 1, 113, by 'emit eum mulier et is mulierem',[4] is now generally, and rightly, abandoned.

Bridegroom purchased bride, but from whom?

later isolated as civil, formed part at one time of the marriage by *confarreatio*. Cf. Ch. Lécrivain in Daremberg and Saglio, sub verb. *manus*.

[1] Text in Bruns, *Fontes*, *Scriptores*, p. 81.

[2] G. 1, 114 and *passim*.

[3] Explanations suggested by Rossbach, *Römische Ehe*, pp. 74–7.

[4] Girard, *Textes*, at G. 1, 113, with note. Cf. Kübler's *Gaius*, 1928.

Those who, like Rossbach, regard *coemptio* as a direct descendant of marriage by sale answer—from father or tutor; those who, like Karlowa, consider it a juristic invention answer—from herself.[1] The whole question is: Who took the *nummus unus* representing the bride-price?—for the only part played by the vendor in *mancipatio* is to be present and accept this coin.[2] In the primitive patriarchal society the woman was bought from her *paterfamilias* or, after his death, from his male agnatic successors. To represent the woman as her own vendor would, then, be the work of the jurist artificially adapting an old institution to new circumstances. But if, as we believe, *coemptio* is necessarily older than the XII Tables which recognize its offshoot, *usus*, the circumstances were legally speaking scarcely changed at all as regards the woman's status. She was still under almost absolute *patria potestas*, if her father was alive, and it was this power, not any power which she had over herself, which was being transferred in the very slightly modified form of *manus* to her husband. If she was *sui juris* tutorship was still a very substantial thing, and the powers of the tutors, along with their proprietary expectations, were to be made over to the husband. At this early stage, the woman had scarcely an interest in herself to sell. The idea of self-sale, if it ever established itself, can only have done so when the position of women, particularly those *sui juris*, had become much more independent, when perpetual guardianship was more shadow than substance. Even in the classical age of Roman law, a faculty of self-sale,

[1] Rossbach, *Römische Ehe*, pp. 77–81 (cf. Westrup, op. cit., pp. 61 et seq.). Karlowa, *Röm. Rg.* 2, 159.

[2] G. 1, 119.

auctore patre, is scarcely compatible with the position of *filiafamilias*.

Self-sale makes *coemptio* a highly artificial fiction which may well be regarded as an invention rather than the survival, with many of its substantial effects, of the primitive bride-purchase. It is moreover, so considered, a fiction which fails to be consistent, is not logically carried through. The *as* which passes to the woman, and so is again her husband's property the moment *coemptio* is complete, is a poor representative of the bride-price.

The expression 'auctore eo (*or* auctoribus illis) coemptionem facere' of Gaius, 1, 115, and 195 a, and *Coll.* 4, 2, 3, is not to be interpreted, with Karlowa, as indicating a *mancipatio* in which the woman takes the role of vendor, while her *pater* or tutor supplies a formal *auctoritas*. For there is more in *coemptio* than this simple *mancipatio*; it involves in the case of a woman *sui juris* the transfer of an estate, which is not even mentioned in the *mancipatio*, and the alienation of which requires *auctoritas tutorum*. In form a sale of the woman, in substance it is a transaction comprising, among other things, the alienation of property and the cessation of tutorship. And in this transaction regarded as a whole it is the woman *sui juris* who, already by the time of Cicero,[1] is the leading spirit. That is why she is spoken of as the person who 'coemptionem facit'; while her tutor, though vendor in the *mancipatio*, is as regards the substance of the matter a mere assistant. In the case of *filiafamilias*, *coemptio* is always marriage,

[1] Cf. *de Oratore*, 1, 56, 237: 'Nam neque illud est mirandum, qui quibus verbis coemptio fiat nesciat, eundem ejus mulieris, quae coemptionem fecerit, causam posse defendere.'

for which she needs the consent of her *paterfamilias*. The *auctore eo* of *Coll.* 4, 2, 3 refers simply to this consent, for it is clear that 'auctoritas' is frequently used of *paterfamilias*, not in the sense of the formal *auctoritas* required of a tutor but as a synonym of 'consensus'. It is thus that Ulpian in D. 23, 2, 9, and Paul in D. 23, 2, 16, 1, use it, while in D. 23, 2, 3 Paul has the form 'me solo auctore' where my informal assent alone is required. Both in regard to *paterfamilias* and *tutores*, the jurists of the classical age have probably ceased so entirely from thinking of *coemptio* as a sale that even on the formal side, though *pater* or *tutor* accepts the coin, he is thought of rather as consenting or authorizing than as selling.

Finally the suggestion of self-sale which has been seen in the language of Cicero and the classical jurists is more than neutralized by the inscription cited by Rossbach,[1] *virginem volentem e parentibus coemit*, reinforced by the terms used in the *Laudatio Turiae*, line 17,[2] *quod emancipata esset Cluvio*—to describe a marriage by *coemptio*. The burden of proving the use of so extraordinary a device as self-sale, in the absence of express mention in the texts, rests with those who assert it, and the evidence thus far adduced is far from satisfactory.

The precise meaning of Gaius 1, 123, when he speaks of a difference between the formula of the ordinary *mancipatio*—which he reproduces thus in 1, 119, 'Hunc ego hominem ex jure Quiritium meum esse aio isque mihi emptus esto hoc aere aeneaque libra'—and that of *coemptio*, is another matter of conjecture. We should

[1] *Römische Ehe*, 77–8. [2] C. I. L. VI. 1527. Girard, *Textes*, 813 et seq.

like to rest content, as Rossbach does,[1] with the hypothesis that the dialogue reported by Boethius, *Topica*, 3, from Ulpian constituted the distinguishing feature. But this dialogue, if only because it is a dialogue, has all the appearance of something quite separate from the dispositive words of the *mancipatio* itself. In 1, 123, Gaius speaks from the point of view of the purchaser, and declares that the words by which the purchase is made are different from those employed when a person is bought *in mancipio* from a parent or *coemptionator*. He seems clearly to have in mind a variation in the formula itself, rather than any accompanying catechism between bride and groom. Karlowa[2] is probably right in deriving the terms in *manu mancipioque*, used by Gellius (4, 3, and 18, 6) to describe the position of *materfamilias*, from the form of *coemptio* itself; in which case his conjecture: 'Te ego ex jure Quiritium in manu mancipioque meo esse aio tuque mihi coempta esto', may approximately reproduce the words of purchase. The dialogue given by Boethius then becomes the formal consent of the parties to the marriage and at the same time a specific determination of the purpose of the act. As such, it may well have constituted the point at which a tutor was asked—'Auctorne es?' and replied with his stereotyped—'Auctor sum'.

Gaius[3] speaks at some length of *coemptio* as a living institution.[4] There is evidence, however, that it was rarely resorted to even in the first century of the Empire;[5] and the provincial jurist, with his tendency to

[1] *Römische Ehe*, 70–1. [2] *Röm. Rg.* 2, 161. [3] 1, 113–15 b.

[4] At the beginning of the Empire it was still in use; there are two specific cases mentioned in the well-known *Laudatio Turiae*.

[5] See below, p. 232.

archaism, may be attributing to the institution a life which it had ceased to have. Only fifty years later, Papinian, Paul, and Ulpian never mention it by name. The two former do indeed speak of *conventio in manum*,[1] but as they are dealing with provisions of the *lex Julia de Adulteriis* their statements are little better than useless as evidence of the survival of *coemptio* into their own time. In the *Regulae*, 9, under the rubric 'De His Qui in Manu Sunt', there is nothing but a brief note on *confarreatio*. The fact that the fourth-century epitomizer, and probably also the compiler whose work he was abridging, omitted all mention of *coemptio*, goes some way to show that it was not being employed, and even that it had not been employed for some time.[2] Later in the same century, Servius describes it as a practice of the ancients.[3] Everything considered, we are justified in the conclusion that *coemptio* had disappeared from use not later than the third century A.D.

III. *Usus.*

Gaius, 1, 111: 'Usu in manum conveniebat, quae anno continuo nupta perseverabat; *quia* enim velut annua possessione usucapiebatur, in familiam viri transibat filiaeque locum optinebat. Itaque lege XII tabularum cautum est, ut si qua nollet eo modo in manum mariti convenire, ea quotannis trinoctio abesset atque eo modo cujusque anni *usum* interrumperet. Sed hoc totum jus partim legibus sublatum est, partim ipsa desuetudine obliteratum est.'

Servius, *in Georg.* 1, 31: 'tribus enim modis apud

[1] *Coll.* 4, 2, 3. 4, 7.

[2] See Fr. Schulz in *Die Epitome Ulpiani*, pp. 9 and 18–19.

[3] *In Georg.* 1, 31.

veteres nuptiae fiebant: usu, si verbi gratia mulier anno uno cum viro, licet sine legibus, fuisset . . .'[1]

Boethius in *Topica*, 3, 14: 'Tribus . . . modis uxor habebatur: usu farreo coemptione.'[2]

Only one thing emerges clearly from the sparse texts on *usus*, namely that by one year's unbroken cohabitation a man acquired *manus* over the woman living with him, provided at any rate the purpose of the union was matrimony. But we are left in the dark as to the status of the parties before the accomplishment of *usus*. Were they married or simply in *de facto* cohabitation? If they were legally man and wife, then it was marriage without *manus*, and we are forced to admit the existence of free marriage prior to the XII Tables, which, according to Gaius and Aulus Gellius, contained regulations on *usus*. *Usus* must then be regarded not as a form of marriage, but solely as a mode of acquiring *manus*.

Gaius describes all three institutions, *usus*, *confarreatio*, and *coemptio*, simply as ways in which *manus* was acquired. In his time marriage was, legally considered, mainly a consensual affair, and he regards *coemptio* and *confarreatio* as additions for special purposes to the usual celebration. *Usus* was obsolete. He presents *coemptio* and *confarreatio* as they were in his own day, and *usus* as it had been. The language he uses gives us no very secure support for a distinction between the two former as having originally been forms of marriage and the latter as never anything more than a device for creating *manus*. There is, however, one difference of possible significance in his treatment. In his note on

[1] Text from Thilo's *Servius*.

[2] Text from Bruns, *Fontes*, *Scriptores*, p. 73.

usus he refers to the XII Tables, and his words, taken literally, would prove that he thought of the union pending the completion of *usus* as being lawful marriage under that code.

The woman, says Gaius, came under *manus*, if she continued 'nupta', married, for one year. Unfortunately 'nuptiae' in the language of the jurists does not always mean marriage. Gaius himself uses the word of a union which is not merely void but incestuous.[1] 'Maritus' is perhaps a shade more technical, but we cannot say that it presupposed *justum matrimonium*, since the same jurist uses it in 1, 68 of a *peregrinus*, probably without *conubium*, married to *civis Romana*. It may, however, be considered at least improbable that it would be employed in reference to a Roman citizen who, without anything recognized as a marriage, had begun cohabiting with a Roman woman. The most that can be said is that Gaius seems to have understood the *trinoctium* clause of the XII Tables—from whose text he may have taken the word 'maritus'—as providing means whereby a lawfully wedded woman could avoid coming under *manus* to her husband.

Both Servius and Boethius speak indiscriminately of three ancient modes of marriage; but there is at least as little reason for expecting legal and historical accuracy of terminology in these writers as for depending upon it in Gaius. The language of Aulus Gellius, 3, 2, is compatible with either marriage or something less.

'Q. quoque Mucium jureconsultum dicere solitum legi non esse usurpatam mulierem, quae, cum Kalendis Januariis apud virum matrimonii causa esse coepisset, ante diem IIII Kalendas Januarias sequentes usurpatum

[1] 1, 64.

isset. non enim posse impleri trinoctium, quod abesse a viro usurpandi causa ex duodecim tabulis deberet, quoniam tertiae noctis posteriores sex horae alterius anni essent, qui inciperet ex Kalendis.'

Matrimonii causa may mean either 'by way of marriage', 'as a wife'; or 'with a view to marriage'. 'Mulier' is used indifferently for 'uxor' in the legal as well as in the literary texts.[1]

Karlowa[2] believes that there is *matrimonium*, but he makes it a *matrimonium juris gentium*, *non justum*, in which the children follow the mother. But if the woman fails in any year to absent herself for three continuous nights, the husband acquires *manus* and the marriage becomes *matrimonium justum*.[3]

Whether a *matrimonium juris gentium* was ever recognized is sufficiently doubtful.[4] That it was recognized before the XII Tables is an assumption of amazing improbability which belies the esoteric character of early Roman law. Karlowa's view has the virtue of conciliating Gaius, Servius, and Boethius, making *usus* a form of strict Roman marriage; unfortunately it is based upon an unfounded and anachronistic conjecture.

If Gaius means what we have attributed to him, it is of course possible that he was mistaken in his conception of an institution which, as he says, had disappeared from practice partly from desuetude and partly by legislation. What he pictured as an adjunct of free marriage, transforming it into *manus* if certain conditions were

[1] See e.g. D. 23, 2 and 3, and 24, 1, *passim*. [2] *Röm. Rg.* 2, 162–3.
[3] Karlowa does not say what the status of earlier children then becomes. It would have been interesting to see how he would have dealt with this problem. [4] See below, p. 96 et seq.

fulfilled, may really have been a device for transforming an irregular union into *justum matrimonium*. But there is another difficulty confronting this conclusion. Are we to suppose that *usus* dispenses with the consent of the woman's *paterfamilias* or guardians? To do so is to contradict Cicero, *pro Flacco*, 34. 84.[1] If not, are *paterfamilias* or guardians to be represented as assenting to an entirely problematic marriage depending on a condition, within the discretion of the woman, which may never be realized or which may be realized under circumstances rendering the marriage undesirable? It is far more natural to suppose that what they accept for *filia* or ward is a regular establishment, a marriage in which, because there has been no *coemptio*, *manus* will be acquired by a sort of usucapion, substitute for sale, provided the woman does not interrupt the process by *usurpatio*.

In my view, then, Roman law had, before the XII Tables, recognized the validity of the marriage celebrated without *confarreatio* or *coemptio*. It had not, however, ceased to regard *manus* as the normal concomitant of marriage. The husband therefore supplied the absence of *manus*-creating formality by one year's usucapion. The idea that this usucapion, like any other, should be nullified by a breach of continuity, then presents itself as a means whereby the woman may cling to her original family, if she so desires. The operation of *usus* must have been independent of agreement. Rossbach's view[2] to the contrary robs the institution of

[1] 'In manum, inquit, convenerat. Nunc audio. Sed quaero, usu an coemptione? Usu non potuit. Nihil enim potest de tutela legitima nisi omnium tutorum auctoritate deminui. Coemptione? Omnibus ergo auctoribus—in quibus certe Flaccum fuisse non dices.'

[2] *Römische Ehe*, pp. 147 et seq.

life and reality. With the choice of an immediate *manus* or free marriage before them, men and women can scarcely have gone on for centuries deliberately choosing this—which was neither the one nor the other, but a state of suspense to be continued at the woman's caprice. The *trinoctium* was still a familiar institution in the time of Quintus Mucius Scaevola, Cicero's contemporary, whose exact delimitation of the time involved was well known.[1] If *trinoctium* was a juristic commonplace, it was so because it was in frequent use as a means of avoiding an otherwise inevitable *manus*.

Two centuries later, *usus* had disappeared from practice.[2] Gaius says that its disappearance is due partly to disuse, partly to legislation, by which he probably means that its rules were rarely or never applied for some time before their abrogation by statute. The statute is supposed by some writers to have been the *lex Julia et Papia Poppaea*.[3] This law may possibly have dealt with *usus*, sufficiently germane to its subject-matter, but it can hardly have abolished it. If Gaius is correct in saying that it had fallen into disuse before complete repeal, we must allow more time than that between Cicero and the *lex Julia et Papia Poppaea*. But there is really no means of fixing the date or the enactment.

IV. *Free Marriage.*

Reasons have already been stated for holding that free marriage, that is to say marriage without *manus*, was recognized at Rome as early as the XII Tables. That it was common practice in the third and second

[1] Aulus Gellius, 3, 2, cited above, p. 87.

[2] G. 1, 111.

[3] Rossbach, op. cit., p. 147 and n. 465.

centuries B.C., can be inferred with some degree of certainty from the following circumstances: (*a*) Gifts between husband and wife are exempted from the limitation imposed by the *lex Cincia* of 204 B.C.[1] Valid gifts presuppose separate property, and separate property is incompatible with *manus*. (*b*) In Ennius, *Cresphontes*,[2] the wife is presented as still under her father's *potestas*, since he can dissolve the marriage by taking her back. (*c*) Cato the Elder, in a speech on the *lex Voconia* of 169 B.C., speaks of a wife as having separate property.[3] In the Rome of the classical jurists, *manus* is a matter of legal archaeology; the marriage to which the rules propounded by the institute-writers of the Digest apply is a free marriage.

The celebration of this later type of union is necessarily divested of the formalities which resulted in *manus* and which, from the legal point of view, constituted the main, if not the sole, essential formal element of valid marriage. Was form, then, completely indifferent in the marriage of classical law? Ulpian is frequently held to say so in D. 50, 17, 30: 'Nuptias non concubitus, sed consensus facit.'[4] If the consent of the consorts—and of course of their *patresfamilias* if they were *alieni juris*—was all that was necessary to make them man and wife, then the marriage must date from the last necessary consent, and there should have been no obstacle to celebration between *absentes*. It is precisely on these two points—date of completion and

[1] Paul in F. V. 302.

[2] *Rhet. ad Her.* 2, 24, 38. Cited, Karlowa, *Röm. Rg.* 2, 168. Ennius lived from 239 to 169 B.C.

[3] Aulus Gellius, 17, 6, 1.

[4] Cf. D. 35, 1, 15. C. Th. 3, 7, 3 affords some support: 'consortium, quod ipsorum consensu atque amicorum fide firmatur.'

celebration *inter absentes*—that the view which rejects all form leads to serious difficulty.

In the first place, there is evidence to show that the status of man and wife dates only from the completion of *in domum deductio* at the earliest. According to the constitution of Aurelian, A.D. 270–5, C. 5, 3, 6, that is the point after which any gift between the consorts is invalid as being made *inter virum et uxorem*. The crabbed passage of Scaevola reproduced in D. 24, 1, 66, proves nothing more than that the gift might be valid though made after *deductio*, provided the parties themselves had for some special reason agreed that their marriage should be regarded as coming into effect at some time thereafter. *Deductio* itself is not enough to constitute marriage; it is nothing more than a placing of the woman at the disposal of the man, and she may have been brought into his house for the purpose of concubinage. Cohabitation is of no legal significance unless the parties are consenting to a present marriage. They must regard each other as man and wife; that is the meaning of that 'maritalis affectio' which distinguishes marriage from concubinage.[1] Until they have begun to regard each other in that light, they are not legally married; that is why they may postpone the legal commencement of the married state until some time after the woman has come to the man's establishment, as happens in D. 24, 1, 66, 1. *Deductio*, then, is not definitive in determining whether a gift is valid, but it is quite compatible with what has been said that one presented before *deductio* is always valid. In the more obvious interpretation Scaevola's text appears to deny this, but the jurist may only mean

[1] Paul, *Sent.* 2, 20, 1. D. 25, 7, 4. C. 5, 17, 11, pr. C. 5, 27, 11, pr. D. 24, 1, 32, 13. D. 48, 20, 5, 1. Nov. 22, c. 3. 117 c. 4 and 5 and 6.

that the question of validity is not finally disposed of by ascertaining the sequence of presentation and *deductio*. The passage is thus reconciled with C. 5, 3, 6, where the usual procedure, a marriage ceremony making clear the will of the parties and followed by *in domum deductio*, is assumed.[1]

Thus, too, the passage denying the possibility of marriage in the woman's absence becomes comprehensible. Paul says in *Sentences*, 2, 19, 8: 'Vir absens uxorem ducere potest; femina absens nubere non potest.' The reason for the difference becomes clear, assuming that *deductio* is necessary to validity, when we turn to the text of Pomponius in D. 23, 2, 5. This, moreover, proclaims in so many words the necessity of that formality, at least in the husband's absence: 'Mulierem absenti per litteras ejus vel per nuntium posse nubere placet, si in domum ejus deduceretur: eam vero quae abesset ex litteris vel nuntio suo duci a marito non posse: deductione enim opus esse in mariti, non in uxoris domum, quasi in domicilium matrimonii.'[2] It is impossible to celebrate a marriage in the woman's absence because she cannot then be 'in domum deducta'.

What then is the meaning of such expressions as 'consensus non concubitus nuptias facit'?[3] Possibly nothing more than this, that *consensus* is essential while *concubitus* is not. That the marriage is complete without cohabitation is clear from the above-cited

[1] Levy demolishes any objection based on D. 24, 1, 66 by a reconstruction of the text which makes *in domum deductio* the decisive point for the validity of gifts, *Ehescheidung*, p. 72.

[2] Cf. D. 23, 2, 6 and 7, where Ulpian and Paul speak of marriage in the man's absence.

[3] Levy, op. cit., p. 70, is perhaps right in regarding them as glosses.

passages from Pomponius, Ulpian, and Paul. The woman who has married an absent person may have an action for the recovery of dowry (and the existence of dowry presupposes marriage) and must mourn as a widow the husband who dies before any cohabitation. But it is likely also that when the parties were present any act signifying a placing of the woman at the husband's disposal was sufficient. This might well be considered as taking place in any ceremony in which the consorts acted the part of consenting bride and groom. In most cases, then, the very transaction in which consent to present union was expressed would constitute a sufficient *deductio*.[1] The accompanied progress to the husband's house may have been insisted on in the age of the classical jurists only when he was away. How universal the practice had once been is shown by the fact that marriage, from the man's point of view, is constantly described as 'uxorem ducere'.

In the late Empire, it had become so common to draw up marriage settlements with detailed provisions concerning dowry and antenuptial gifts that it appears to have been widely believed that such a contract was a necessary condition of validity.[2] A popular error of this sort seems at any rate to have been the cause of the

[1] I doubt whether C. Th. 3, 7, 3: 'consortium quod ipsorum consensu atque amicorum fide firmatur', or C. 5, 17, 8, pr.: 'Consensu licita matrimonia posse contrahi . . .' carries us any farther. The contrast in the last text is the comparative formlessness of marriage as against the formality of divorce. Levy, op. cit., pp. 103, notes 1 and 5, and 70, note 5, takes this, along with C. Th. 7, 13, 6, pr. and certain passages of Tertullian and St. Augustin which he cites, as proving marriage by consent without *deductio* in the late Empire.

[2] In many of the native Eastern systems the written marriage contract was essential. See Mitteis, *Reichsrecht*, pp. 225 et seq.

enactment of A.D. 428 (C. Th. 3, 7, 3) which insists on the purely incidental character of 'dotis instrumenta'.[1] Later, Justinus makes the contract essential for the marriage of senatorials and ex-actresses.[2] In A.D.529–30, Justinian (C. 5, 27, 10 and 11) lays it down that when two people living in concubinage, and having or being about to have an illegitimate child or children, begin to regard each other with *maritalis affectio*, they may, by drawing up a dotal instrument, legitimize children already born or conceived. Subsequent children are of course born *ex justo matrimonio*. And in 542 (Nov. 117, c. 4) he enacts that to be valid the marriage of *illustres* and higher dignitaries must be marked by the conclusion of a marriage contract.

With the exception of the cases specified in the last paragraph, there was nothing but *affectus maritalis* to distinguish marriage from concubinage. Though a placing of the woman at the man's disposal, roughly described as *domum deductio*, appears to have been necessary in the celebration of marriage, this was no safe criterion, for its object might have been precisely concubinage. *Affectus maritalis* is a mental condition hard to establish if one party is dead or denies that it ever existed. On the other hand, the question of marriage or no marriage may be all-important for the children. Certain *indicia* were therefore admitted as proving marriage unless the presumption was rebutted. Thus cohabitation with a free woman who has not been a prostitute was presumed to be marriage, if we admit

[1] Cf. D. 24, 1, 66.

[2] C. 5, 4, 23, 1–1 b. A.D. 520–3. The actress must be restored to respectability by imperial certificate, a requirement discarded by Justinian, C. 5, 4, 29, 6. Nov. 117, c. 6. Justinian's law still called for a dotal instrument if the man was *majori dignitate decoratus*.

the genuineness of the text ascribed to Modestinus in D. 23, 2, 24. This *prima facie* recognition would of course succumb to proof that the man was of senatorial rank and the woman a freedwoman—until Justinian repealed this article of the *lex Julia* as re-enacted by Marcus Aurelius—or that the *instrumentum dotale* called for as mentioned in the last paragraph had not been drawn up. From a constitution of Theodosius and Valentinian, A.D. 428, C. 5, 4, 22, it may perhaps be inferred that the presumption depended in their time upon equality of rank; if so it was made general for all *ingenui* by Justinian, A.D. 520–3, C. 5, 4, 23, 7.

V. *Matrimonium juris gentium.*

Roman law attached legal consequences to various types of union in which a man and woman conducted and regarded themselves as husband and wife but which lacked one or more of the elements of *justae nuptiae*. These consequences are brought together by modern Romanists under the independent category of *matrimonium juris gentium*. The invention of a term not used in the sources to serve as a convenient appellation for a group of unclassified legal phenomena may readily be justified. But this term has long been used as something more than a mere convenience—it embodies the assumption of a positive institution, which has sometimes done duty as a stopgap for *lacunae* in our knowledge of family relations at Rome. Some of the purely conjectural manifestations of *matrimonium juris gentium* will be dealt with in what follows; at this point two instances will illustrate the dangers attendant upon the theoretical creation of an institution. In his *Römische Rechtsgeschichte*, 2, 162 and 167, Karlowa had

no hesitation in admitting *matrimonium juris gentium* between Roman citizens, first as a form of matrimony possible between patrician and plebeian before the *lex Canuleia*, and secondly as the relation preceding the accomplishment of *usus*. We are thus confronted with a complete dualism; asked, in other words, to admit the existence of two recognized types of marriage even as between Roman citizens, one valid by the civil law of the city, the other by a law common to all civilized peoples.

These and other more moderate hypotheses, involving the assumption that *matrimonium juris gentium* was a recognized and operative form of marital union, start from a very limited number of texts cited here and there by modern writers. It has seemed worth while to bring together and re-examine the rules laid down in these texts, with a view to ascertaining whether they necessarily form part of any synthesis familiar to the Roman jurist.

(*a*) Foreign marriages.

That the marriage between two aliens, valid in their own country, produced effects recognized also at Rome is proved by Gaius, 1, 92: 'Peregrina quoque si volgo conceperit, deinde civis Romana *facta* tunc pariat, civem Romanum parit; si vero ex peregrino secundum leges moresque peregrinorum concep*er*it, ita videtur ex senatus consulto, quod auctore divo Hadriano factum est, civem Romanum parere, si et patri ejus civitas Romana donet*ur*.' The case is one falling under the modern caption of 'conflict of laws'; the Roman court asked to determine the status of the child must inquire into the validity of the union according to the national law of the parties. If the question of validity is answered affirmatively the child takes the status of the father, if not, that of the mother.

The marriage of a Roman woman with a peregrine having *conubium* was also a foreign marriage and any issue took the condition of the father, the respective rights and duties of parents and children being determined by his national law.[1] The passage which proves this incidentally confirms what has been said about the regular union of two peregrines. Gaius, 1, 77: 'Item si civis Romana peregrino, cum quo ei conubium est, nupserit, peregrinus sane procreatur et is justus patris filius est, tamquam si ex peregrina eum procreasset. Hoc tamen tempore *e* senatus consulto quod auctore divo Hadriano sacratissimo factum est, etiamsi non fuerit conubium inter civem Romanam et peregrinum, qui nascitur, justus patris filius est.' In the second case put by Gaius in this text the child was peregrine by virtue of the *lex Minicia*. That statute had altered the earlier rule, which the jurists considered universal and ascribed to the *jus gentium*, that in the absence of *conubium* the child followed the mother.[2] The *senatusconsultum*, probably the same as that attributed to Hadrian in G. 1, 92, laid it down that the child should not be regarded at Roman law as *vulgo conceptus* but as legitimate offspring of his father. He would accordingly be included in a grant of citizenship to the peregrine and his children, but would only be subjected to *patria potestas* by explicit concession of the Emperor.[3]

The same circumstances as those contemplated at the end of G. 1, 77 seem to have been in Cicero's mind in *Topica*, 4, 20: 'Si mulier, cum fuisset nupta cum eo, quicum conubium non esset, nuntium remisit; quo-

[1] Cf. Rossbach, *Römische Ehe*, p. 465; Mitteis, *Reichsrecht*, p. 105; Meyer, *Konkubinat*, p. 31.

[2] G. 1, 78.

[3] G. 1, 93.

niam, qui nati sunt, patrem non secuntur, pro liberis manere nil oportet.' Rossbach[1] and P. M. Meyer[2] are probably right in taking this as a marriage between a Roman woman and a *peregrinus*. There were no *Latini Juniani* in Cicero's time, and the *lex Julia et Papia*, with its prohibition of marriages between certain classes, had not yet been enacted. The non-conubium of the unprivileged alien would therefore be the instance most ready to hand. By the *lex Minicia*[3] any offspring were peregrine, and it was not until Hadrian's time that a *senatusconsultum* declared them *justi filii* of their father. Not being *justi filii*, they afforded no claim to *retentiones propter liberos*. Yet the union was not devoid of legal effect—there were *repudium*, dowry, and an action, probably begun before the *praetor peregrinus*, for its recovery. It was, say Czyhlarz[4] and Karlowa,[5] *matrimonium juris gentium*, and the text is cited to prove the possibility of *dos* in that type of marriage. Intermarriage between Roman women and foreign traders must indeed have occurred, and Cicero gives good grounds here for believing that the practice of constituting dowry in such marriages and of granting actions for its recovery did in fact exist.[6] Where the woman had married in the mistaken belief that her husband was a Roman, provision was

[1] *Römische Ehe*, p. 465, n. 1637. [2] Op. cit., p. 31.

[3] Which included the Latins of that time among *peregrini*, G. 1, 79.

[4] *Dotalrecht*, pp. 80–3. [5] *Röm. Rg.* 2, 183–4.

[6] According to Papinian, D. 23, 2, 61, *dos* becomes *caduca*, if a union proves 'illicitum'. He apparently refers to a marriage absolutely void, as would be the case if the consorts were related within the prohibited degree, were not of marriageable age, or belonged to the prohibited classes affected by the *senatusconsultum* of Marcus Aurelius. Above, p. 35.

subsequently made in the *senatusconsultum* mentioned by Gaius, 1, 67–8, to enable her, by proving the error, to acquire citizenship for her husband and children. The marriage, which, like those discussed in Gaius, 1, 77, had been foreign, was thereby raised to the rank of *justae nuptiae*, and the children consequently came under the *potestas* of their father.

The *lex Aelia Sentia* made statutory provision for one case of valid marriage between non-Romans. The *Latinus Junianus* who married a *Latina coloniaria* or *Juniana* in the presence of seven witnesses (as prescribed in that law) could, as soon as he had a child one year old, demand Roman citizenship for himself, his wife, and his child.[1] He might even marry a Roman woman, and acquire citizenship in the same way. Where the mother was a Roman citizen, there was some doubt as to the status of the child before the grant of citizenship to his father. *Latini Juniani* were not *peregrini* within the meaning of the *lex Minicia*.[2] The child should therefore have been regarded as Roman, unless indeed the *lex Aelia Sentia* could, as some jurists thought, be interpreted as conferring *conubium* upon *Latini Juniani*, in which case any offspring would be Latin in virtue of the rule 'semper conubium efficit, ut qui nascitur patris condicioni accedat'. The doubt was settled by a *senatusconsultum* of Hadrian enacting that children of *Latinus* and *Romana* should be Roman.[3] But all of these marriages under the *lex Aelia Sentia*, though they are not strictly Roman and for that reason have been mentioned here, must fall outside the description *matrimonium juris gentium*, since they are governed by a Roman statute. Nor was there any *matrimonium juris*

[1] G. 1, 29–32. [2] G. 1, 79. [3] G. 1, 80.

gentium to save the *Latinus Junianus* who married without observing this law. His children acceded to the condition of their mother, whether she was Roman, Latin, or *peregrina*; they were not *justi filii* to their father.[1]

(*b*) Marriages between Romans and alien women.

The *senatusconsultum* of Hadrian[2] which made *justi filii* of the issue of a Roman woman and her alien husband did not apply where the man was Roman and the woman peregrine. If it had, it would have made the children Roman citizens, and the importance of *conubium* as between Roman and alien would have completely disappeared. In fact the children were not *justi*, not *in potestate*, and not *Romani*. They might, it is true, become all these things if their father proved that he had married believing his wife to be a Roman citizen. This step would at the same time confer citizenship on the woman.[3] Failing such *erroris causae probatio*, the only legal consequence of the union for which we have any textual authority is the man's right to prosecute his spouse for adultery.[4] Even this he could not do *jure mariti*, but only *jure extranei*,[5] and when we consider that the infidelity of a concubine was in some circumstances adultery within the meaning of the *lex Julia de Adulteriis*,[6] the concession is of no great significance.

[1] G. 1, 66, 80, 81; 3, 72. [2] *Supra*, p. 98. [3] G. 1, 67.

[4] There is some evidence for the view that a Roman father might institute *peregrini* children as his heirs. They lost part of the succession to the *fiscus*, until Antoninus Pius relieved them of this disadvantage—Meyer, op. cit., p. 32, citing Pausanias, 8, 43, 5. These were concessions to blood relationship, which is a matter of fact, not law.

[5] Papinian in *Coll.* 4, 5.

[6] D. 48, 5, 14, pr. Severus and Caracalla permitted a *sponsus* to prosecute his *sponsa* for infidelity. D. 48, 5, 14, 3 and 8.

It has been established in what precedes that when two peregrines, or a Roman woman and a peregrine with *conubium*, married in accordance with the national law of the husband, Roman courts recognized the consequences attributed to the marriage by that law. Even where the *peregrinus* lacked *conubium*, some of the legal results of marriage were admitted. The condition was conformity, not with a law theoretically common to civilized mankind, the *jus gentium*, but with the law of a particular community. These are not, then, instances of *matrimonium juris gentium*. It is also clear that when a *Romanus* married a *peregrina* without *conubium* the usual legal consequences of marriage did not follow. There is little to suggest that the union was anything more than *de facto*. The reason for the difference is not far to seek. In a patriarchal society with any desire to conserve its racial purity, exogamy is more easily permitted for women than for men.

(*c*) Marriages between Romans without *conubium*.

In the extract from Papinian found in *Coll.* 4, 5, the jurist contemplates not only marriage between a Roman and a *peregrina* but between a Roman and a Roman woman with whom he has not *conubium*. In both cases the *lex Julia de Adulteriis* is applicable. Ulpian is probably also thinking of both possibilities in D. 48, 5, 14, 1, where he appears to draw a sharp distinction between *concubina* and *uxor injusta*. Quoting Africanus, he declares that the *lex Julia de Adulteriis* 'ad omnia matrimonia pertinet'. In D. 38, 11, 1, pr., he mentions *matrimonium justum* and *injustum*. Only on the basis of *matrimonium justum* can *bonorum possessio unde vir et uxor* be secured. The *matrimonium* may be *injustum* either because it involves a non-Roman who has not been privileged with *conubium*, or because one party,

though Roman, belongs to a prohibited class under the *lex Julia et Papia*.[1]

The *matrimonium non legitimum* mentioned by Callistratus, D. 50, 1, 37, 2, is probably synonymous with Ulpian's *matrimonium non justum*. *Conubium* is lacking because one consort is an alien or belongs to an ineligible class. The woman, we are told, does not participate in the civic rights and duties of the municipality of her *maritus*, as she would do in *justae nuptiae*.[2]

The view is widely held that the words *matrimonium* and *uxorem ducere*, when they refer to marital associations not in conformity with the civil law, are used in the technical sense of *matrimonium juris gentium*. In reality the *omnia matrimonia* of D. 48, 5, 14, 1 include (*a*) the fully legal Roman marriage; (*b*) the Roman marriage deprived of some of its privileges because it conflicts with the Augustan legislation; (*c*) the valid foreign marriage; and (*d*) the union between a *Romanus* and a *peregrina* without *conubium*. In the last-mentioned use, which occurs for example in Gaius, 1, 75, *matrimonium* is not a technical legal term at all. The union is a *de facto* one maintained with an *affectio maritalis* which, while it is insufficient to transform the association into legal marriage, distinguishes it from transient cohabitation and from concubinage. Such

[1] If the *lex Julia et Papia* did not annul, it is perhaps incorrect to say that it withdrew *conubium*. On the other hand the *S. C. divi Marci* undoubtedly did so. Nevertheless, neither Ulpian, *Reg.* 5, nor Paul, *Sent.* 2, 19, mentions the *lex* or the *S. C.* in discussing *conubium* and its absence.

[2] Marriage without *manus* did not change the *civitas* of the woman even where there was *conubium* (Mommsen, *Staatsrecht*, vol. iii, pt. 1, p. 36, n. 1), but, given *conubium*, did change her domicil to that of the husband. C. 12, 1, 13. D. 50, 1, 22, 1; 32.

relationships were doubtless popularly described as *matrimonia*, and the jurist, lacking a technical word, uses the popular term to designate not a *jure gentium* but a *de facto* marriage.

(*d*) Deportation.

The deported convict ceased to be a Roman citizen and in strict logic could no longer be a party to a Roman marriage. Hartmann has suggested that this consequence was at first accepted but that legal doctrine, having passed through a possible intermediate stage in which a transformation into *matrimonium juris gentium* was admitted, came finally to regard the marriage as continuing *ipso jure*. Czyhlarz and Karlowa take the simple view that the marriage ceased to be *justae nuptiae* but continued as *matrimonium juris gentium*. The dotal arrangement survived until this *matrimonium* was dissolved by divorce or death; that is why the husband retained the dowry on his wife's deportation, and why the *fiscus* confiscated it as part of a deported husband's estate.[1]

The texts in the Digest which lay it down that marriage was not dissolved by deportation are almost certainly interpolated.[2] In D. 24, 3, 56, Paul says that the deported wife ceases to be *nupta*, and this statement, which probably owes its survival to an oversight on the part of the compilers, is now generally considered a true account of the law in his day. The contrary rule is not earlier than Alexander, and may be as late as Constantine.[3] It has all the appearance of being, like the

[1] Hartmann in Z. S. St., 1888, pp. 46–9. Czyhlarz, *Dotalrecht*, pp. 82–3. Karlowa, op. cit. 2, 184.

[2] D. 24, 1, 13, 1. 48, 20, 5, 1—both from Ulpian.

[3] See below, pp. 211. The marriage is represented as continuing in the constitutions of Alexander and Constantine, C. 5, 16, 24, 2 and 5, 17, 1. Cf. Nov. 22, c. 13, where Justinian ascribes the change to Constantine.

final enactment for the case of captivity,[1] a legislative intervention inspired by motives of humanity and undeterred by legal logic. In any case, not one of the texts cited has anything to say of a transformation in the legal character of the bond between husband and wife. With the exception of the excerpt from Paul, which denies continuance, they state simply that the marriage is not dissolved.

Conclusions.

The cases examined are those which have given rise to the hypothesis of *matrimonium juris gentium*. Since we can explain them without recourse to this hypothesis, they are insufficient to prove that the concept was present to the mind of the Roman jurist. In the law of real rights there are clearly specified *jure gentium* methods of acquisition, just as in the law of obligations there are contracts *jure gentium*. In all the juristic discussion of marriage the expression *matrimonium juris gentium* never occurs—a surprising omission in view of the rules ascribed by modern doctrine to that presumed institution. More than that, there is no explicit reference to any *jure gentium* mode of celebrating marriage, nor any designation of *jure gentium* effects, unless we take the *semper conubium efficit, ut qui nascitur patris condicioni accedat* of Gaius, 1, 80, as equivalent to *jure gentium conubium efficit*, &c. But the *conubium* must be taken here as meaning lawful marriage, and the passage suggests no *jure gentium* definition of what that means. The same is true of the rule, ascribed by Gaius, 1, 78, to the *jus gentium*, that where there is no *conubium* any offspring follows the mother, and of the classification of marital relations between ascendants

[1] See below, p. 215.

and descendants as *incestus jure gentium*.[1] The statement that all legal systems prohibit marriage with descendants and assign legitimate children to the condition of their father and illegitimate children to that of their mother does not presuppose a category of lawful marriage depending upon universally recognized conditions.

[1] D. 12, 7, 5, 1. 23, 2, 68. 48, 5, 39, 2.

PART II

THE EFFECTS OF MARRIAGE

CHAPTER IV

STATUS, CAPACITY, AND PROPRIETARY RELATIONS OF CONSORTS

FOR the man, no change in status resulted from marriage.[1] It did not, as it does in some of the modern systems derived from Roman law, constitute emancipation from *patria potestas*; it had no direct effect on his citizenship or rank, though it might indirectly enhance his position in the State. A man must marry in order to have legitimate offspring—*sui heredes* to continue his estate and his cult, and to provide that worship necessary to the peace of the spirit which survived his death. For the priesthoods of Jupiter, Mars, and Romulus, and for the office of *rex sacrorum*, marriage by *confarreatio* was an essential qualification. In the election of magistrates, the division of magisterial duties, and in the assignment of provinces to pro-magistrates, the married man was preferred to the unmarried and the man with more children to the man with less. Moreover, each child subtracted a year from the age qualifying for office and from the legal interval between offices.[2] From the time of Augustus to that of Constantine an unmarried

[1] Some heightening of the position of a *filiusfamilias* may have ensued. Dionysius, 2, 27, asserts that a father might not sell a married son.

[2] For details see Jörs, *Verhältnis*, &c., §§ 13–18, citing among other sources Gellius, 2, 15, 4; Tacitus, *Annals*, 15, 19; Suetonius, *Augustus*, 44.

person of marriageable age could not as a rule take property devised in the will of a testator outside the seventh degree of cognation, while the married but childless could take only a portion.[1] These, however, are not matters of status properly so called.

The exact opposite was true of the woman. For her, marriage implied a profound change of status. Even when the wellnigh absolute power of *manus* ceased to be assigned to the husband, giving way to the more equal relations of the free marriage, the position of *justa uxor* continued to be legally as well as socially distinct from that of the spinster. The differences in the wife's status as between *manus* and free marriage are so great, however, that the two institutions must be dealt with separately.

1. *Manus.*

The *filiafamilias* who came under *manus* left her original family, was no longer under the *potestas* of her father, was no longer an agnate of his agnates or a member of his *gens*. The girl or woman *sui juris* broke off all her agnatic relationships, was relieved of any obligation to maintain the cult of her fathers, and ceased to be under *tutela*. Whether *alieni* or *sui juris* before marriage, the bride entered the agnatic family and the *gens* of her husband, to whom she was henceforth *in loco filiae*. If, as would frequently be the case, the husband was *filiusfamilias*, the rights implied in *manus* vested in his *paterfamilias*, whose relation to the woman was as that of a grandfather to a granddaughter by a son.[2] For the sake of convenience, however, we

[1] Penalties for celibacy were apparently not an entirely new thing. According to Val. Max. 2, 9, 1, the censors Camillus and Postumius fined men 'qui ad senectutem caelibes pervenerant'.

[2] The wife was described as *in filii manu*, but her father-in-law had jurisdiction over her and power to break off the union. *Coll.* 16. 2, 3.

shall speak of the husband as exercising the rights of *manus*, as he would if *sui juris*.[1]

For most purposes, *manus* was identical with *patria potestas*, but it was apparently subjected at a very early date to certain limitations. Thus Plutarch cites a law of Romulus which is commonly interpreted as punishing the sale of a wife with *capitis sacratio*.[2] The family council which the head of the family may or may not call, at his discretion, before passing sentence of death on a child must be summoned before a wife may be condemned, and must include some of her blood relatives. The sanction of this rule was probably, however, not the civil one of nullity of the proceedings, but a censorial penalty. Valerius Maximus records that in 307 B.C., L. Annius was removed from the senate for divorcing his wife without summoning a council.[3]

[1] For *manus* generally the most direct authority is Gaius, 1, 49; 108; 111; 136; 137; 137 a; 162.

[2] *Rom.* 22: *τὸν δ' ἀποδόμενον γυναῖκα θύεσθαι χθονίοις θεοῖς.* But I am inclined to translate this with Voigt (*Leges Regiae*, pp. 37 et seq.) and Brini (*Matrimonio*, 2, pp. 75–9) and Esmein (*Mélanges*, p. 18) as: 'He who puts away his wife must make expiatory sacrifice to the Di Manes.' Girard (*Textes*, p. 6) adopts the interpretation mentioned in the text. As for *noxae deditio*, Karlowa, *Röm. Rg.* 2, 153–4, says that it is not proven, and he rightly denies the force of D. 27, 6, 9, 1, upon which Schlesinger (*Zeitschrift für Rechtsgeschichte*, 8, 51 et seq) relies for the affirmative. But since the bride's status was *quasi filiae*, the burden of proof is upon those who deny the legality of *noxae deditio* in the case of wives *in manu*. *Noxae deditio* placed the person so handed over *in mancipio*, did not make him *servus* but only *servi loco* (G. 1, 138–41). There is no doubt that a wife *in manu* could be transferred *in mancipio* (G. 1, 118), and the natural inference, in the absence of any text to the contrary, is that this might be done, as in the case of a daughter, to avoid paying compensation for a delict committed by her. In this sense, Girard, *Les Actions Noxales*, *Mélanges de droit romain*, 2, 1923, pp. 325–6.

[3] Val. Max. 2, 9, 2. Cf. Dionysius 2, 25: *ταῦτα ... οἱ συγγενεῖς μετὰ τοῦ ἀνδρὸς ἐδίκαζον· ἐν οἷς ἦν φθορὰ σώματος ...*

Manus is precisely the same in its effect on the capacity to hold property and to contract as *potestas*. For the *filiafamilias* marriage therefore makes no change in this respect, except that anything she acquires henceforth will vest in her husband instead of her father. As for the woman *sui juris*, all her existing assets go with her into her husband's family,[1] with the exception of rights extinguished by her *capitis deminutio*.[2] Her contractual liabilities are automatically discharged at civil law by the *capitis deminutio*, but the *praetor* grants a *utilis actio rescissa capitis deminutione* for their enforcement.[3] Acquisitions subsequent to marriage accrue to her husband.[4] But before the end of the Republic such acquisitions have ceased to become the absolute and definitive property of the husband. Cicero says in *Topica*, 4, 23, that the enrichment is *dotis nomine*, which means that it is subject to restitution under the ordinary conditions of dowry. There are indeed some passages in literary texts,[5] referring to an earlier date than this, which represent the wife as exercising a claim to restitution without any clear limitation to the free marriage. Certain authors have understood the earliest of these, namely Cato's speech quoted by Aulus Gellius in *Noctes Atticae*, 10, 23, as relating essentially to a marriage with *manus*,[6] because they take the *vir* and *judex* as identical and hold that the husband had domestic jurisdiction only when he had *manus*. But the most natural interpretation is that the

[1] Cicero, *Top.* 4. 23. Note that Cicero adds *dotis nomine*, a qualification which does not appear in G. 2, 98.

[2] G. 3, 83.

[3] G. 3, 84. D. 4, 5.

[4] Ulpian, *Reg.* 19, 18–19.

[5] Aulus Gellius, 10, 23; Pliny, *H. N.* 14, 13–14; Val. Max. 8, 2, 3.

[6] e.g. Karlowa, *Röm. Rg.* 2, 211–12; Czyhlarz, op. cit. 37, n. 16.

judex here is the judge appointed in the usual way after reference to a magistrate, and no inference may therefore be drawn as to the character of the union. Free marriage was obviously common in Cato's age, as many *indicia*, including his own *suasio legis Voconiae*,[1] show. As the evidence stands at present, Cicero's is the earliest clear statement that property brought in by *conventio in manum* was subject to the dotal régime.

Any rights arising out of contracts entered into by the wife *in manu* vested in her husband.[2] But at civil law she could bind neither her husband nor herself,[3] her position being that of *filia*, not *filius*.[4] On the other hand, the *filia* could clearly have *peculium profecticium* and render her *paterfamilias* liable under the praetorian law to an *actio de peculio*.[5] We have no record of such proceedings against a husband on obligations assumed by a wife, but there seems no reason in principle why they should not have been possible.[6]

Under *manus* the woman was *sua heres* to her husband.[7] She succeeded to his estate, along with the children of the marriage if any, in the first rank of successors, and the usual rules of *exheredatio* applied if he made a will. To children in her husband's *potestas*, whether by her or a former wife or by adoption, she was legally as a sister and had the right to succeed them as an agnate of the second degree if, having become *sui juris* without *capitis deminutio*, they died intestate.[8] To her father-in-law she was *neptis loco*, and upon the

[1] Aulus Gellius, 17, 6.
[2] Ulpian, *Reg.* 19, 18.
[3] G. 3, 104.
[4] D. 13, 6, 3, 4.
[5] D. 13, 6, 3, 4. 23, 3, 24. 25, 2, 3, 4. F. V. 294.
[6] Cf. Karlowa, *Röm. Rg.* 2, 191–2. Girard would limit the action to the enrichment of the *peculium*—*Manuel*, p. 474, n. 2; 475, nn. 1 and 3.
[7] *Coll.* 16, 2, 3.
[8] *Coll.* 16, 2, 14. G. 3, 14.

death or emancipation of her husband became *sua heres*, along with the children, to her quasi grandfather.[1]

The husband may in his will appoint a tutor for his wife, or grant her the right of choosing one.[2] He may emancipate her during his lifetime.[3] Emancipation puts an end to *manus*, but the pair presumably remain *vir et uxor* after the recognition of free marriage. In the time of Gaius the wife *in manu* may divorce, and having delivered her *repudium* in proper form may compel the man to emancipate her.[4] So long as she remains married she can no more force him to emancipate her than a *filiafamilias* can exact emancipation from her *paterfamilias*.[5]

2. Free marriage.

In marriages without *conventio in manum*, the wife remained a member of her original family, under the *potestas* of the *paterfamilias* if she had one, *sui juris* if she had not. If under *tutela* before marriage, as every woman *sui juris* must be until late in the Empire, she continued to be subject to the same guardianship unless and until liberated therefrom by the *jus liberorum* of the *lex Julia et Papia Poppaea*.[6] She shared the official dignity of her husband, became, that is to say, consular, senatorial, *illustris*, *clarissima*, and so forth, according to his rank.[7] On the other hand, free marriage, since it did not change the family or *gens* of the bride, can scarcely have made a patrician of a plebeian woman or an *ingenua* of a *libertina*.[8] The wife took the domicil of her husband, just as she does in modern law,[9] and thus

[1] *Coll.* 16, 2, 3.
[2] G. 1, 148–54.
[3] G. 1, 137.
[4] G. 1, 137 a.
[5] Ibid.
[6] G. 1, 145; 194.
[7] D. 1, 9, 1, 1; 8; 12. C. 12, 1, 13. 5, 4, 10.
[8] Cf. Girard, *Manuel*, p. 170, n. 4.
[9] C. 12, 1, 13. D. 50, 1, 22, 1; 32.

became bound as an *incola* to municipal duties in his municipality, but she did not acquire his *civitas*.[1] In republican Rome there was apparently some difference in the estimation in which a wife was held according as she was subject to *manus* or not. Under *manus* she was *materfamilias*; the wife of the free marriage was merely *uxor*.[2] But in the second century A.D. any wife, widow, or maid may be *materfamilias*, the word signifying merely a woman of good character.[3]

Free marriage had no effect on the general proprietary and contractual capacity of the wife. If *filiafamilias*, she continued to acquire real and personal rights for her *paterfamilias*, whom, however, she could not bind except within the sphere of the praetorian actions *adjectitiae qualitatis*.[4] Any acquisitions made by reason of betrothal or marriage were in the late Empire part of her *bona adventitia*, of which she remained owner, her father having only a usufruct. If *sui juris* she acquired and contracted for herself, subject only to the limitations of tutorship, so long as that remained perpetual, and of curatorship if she was under twenty-five.[5]

[1] D. 50, 1, 1. Cf. Mommsen, *Staatsrecht*, vol. 3, pt. 1, p. 36, n. 1.

[2] Cic. *Top.* 3, 14: 'Genus enim est uxor; ejus duae formae: una matrumfamilias, [eae sunt, quae in manum convenerunt;] altera earum, quae tantum modo uxores habentur . . .' Cf. Aulus Gellius, 18, 6, 9, and Boethius, *in Topica*, 3, 4, which limits the title to those who come under *manus* by *coemptio*, explicitly refusing it where *manus* resulted from *confarreatio* or *usus*.

[3] Ulpian in D. 50, 16, 46, 1.

[4] D. 13, 6, 3, 4.

[5] While the perpetual tutorship of women lasted she would frequently have both tutor and curator up to the age of 25. When tutorship ended at 12, as it began to do some time after Diocletian, she would frequently have a curator up to the age of 25. Cf. Solazzi, *Minore Età*, pp. 51 and 135; Bonfante, *Corso*, 1, p. 498, and 499, n. 1.

Property belonging to her before marriage remained hers, unless indeed she made it over as *dos* to her husband.

Some particular restrictions on the married woman's capacity did exist. In D. 16, 1, 2, pr., Ulpian mentions edicts of Augustus and of Claudius prohibiting her from going surety or otherwise assuming obligations on behalf of her husband. These were generalized in the *senatusconsultum Velleianum*, of the reign of Claudius or Vespasian, which relieved all women from the effects of contracts of surety. Certain exceptions were admitted, and those in favour of a creditor minor and of the promise of dowry[1] may have applied even where the principal debtor was husband of the surety. Clearly a loan made directly to a wife, though intended for her husband, was binding upon her.[2] When Justinian recast the law pertaining to women sureties,[3] he enacted that any intercession by a wife in favour of her husband should be absolutely void.

Gifts between husband and wife.

One disability affected both consorts equally. With some exceptions they could not make each other valid gifts. This was a rule of customary law, according to Ulpian in D. 24, 1, 1, designed to prevent extravagant self-sacrifice on the impulse of conjugal affection. Certainly it had not existed in the early Republic, for the *lex Cincia* of 204 B.C. specifically exempts gifts between husband and wife, as well as those between *sponsus* and *sponsa*, from the limitation which it imposes

[1] D. 4, 4, 12. C. 4, 29, 12.

[2] D. 16, 1, 17, pr. C. 4, 29, 13. Knowledge, on the part of the lender, of such intention apparently justified the *exceptio* in the time of Africanus, but has no effect under the constitution of Diocletian.

[3] C. 4, 29, 23, 2. Nov. 118, c. 5. Nov. 134, c. 8.

upon gifts in general.[1] The prohibition is already old in the classical period of Roman law[2] and extends also to gifts from persons connected with the consorts by the tie of *potestas*. A list of such persons is given by Ulpian in D. 24, 1, 3.

The exceptions were of two sorts, general and particular. To the first class belonged all gifts which did not make the donor poorer and the recipient richer.[3] Curiously enough, the time to which the inquiry as to enrichment referred was not the moment of donation but that of *litis contestatio* in the suit for recovery.[4] An example of the type of transaction permitted on the ground that it did not impoverish the donor shows how much the jurists desired to limit the prohibition. In D. 24, 1, 5, 13, Ulpian quotes with tacit approval the opinion of Julian that the refusal of an inheritance which consequently accrues to the wife is not a gift within the meaning of the rule, because impoverishment consists in the actual diminution of an estate, not in failure to acquire additional property. Similar liberality is evident in the interpretation of enrichment. Money spent by the woman on food for herself or her slaves, or on ointments, was not regarded as enriching her.[5] Severus constituted a second general exception by the *oratio* quoted in D. 24, 1, 23, 32 and 33. The effect of this enactment was to render valid any gift from a

[1] F.V. 302. The date of the *lex* is fixed by Cicero, *De Oratore*, 2, 71 and *De Senectute*, 4, 10. Girard, *Manuel*, 951, n. 4.

[2] D. 24, 1, 3, pr.—'Majores nostri . . . prohibuerunt.'

[3] D. 24, 1, 5, 8 and 16.

[4] D. 24, 1, 7, pr. D. 24, 1, 5, 18—'hactenus revocatur donum ab eo ab eave cui donatum est, ut, si quidem exstet res, vindicetur, si consumpta sit, condicatur hactenus, quatenus locupletior quis eorum factus est.'

[5] Pomponius in D. 24, 1, 31, 9.

consort who died *constante matrimonio* without having repented of the liberality. The will to give was presumed to have endured up to the donor's death and was upheld as if confirmed by a clause in his testament.[1] The practical result was, of course, that the giver's heir could not take back what had been given, and must deliver the object if found in the inheritance. But the extent to which one consort could bind an heir by gratuitous unrevoked promise in favour of the other is somewhat uncertain. In D. 24, 1, 23, Papinian is reported as holding that a gratuitous stipulation is not binding on the heir. Ulpian agrees, but in D. 24, 1, 33, declares the stipulation of an annuity valid. Papinian would limit the application of the *oratio Severi* to the completed gift of *concrete objects*: the mere promise to give cannot be enforced against the heir of the promissor consort. Ulpian, in spite of his approval of the principle, admits a transaction which appears to contradict it.

The particular exceptions were determined by the purpose of the gift. Thus *donationes mortis causa*,[2] *divortii causa*,[3] *exilii causa*,[4] *honoris causa*,[5] *servi manumittendi gratia*,[6] *ad refectionem aedium*,[7] and

[1] It appears to have been subject to the provision in the *lex Papia* limiting the childless surviving consort to one-tenth of any bequest. F. V. 294. The *lex Falcidia* certainly applied—D. 24, 1, 32, 1.

[2] D. 24, 1, 9, 2; 10; 11.

[3] D. 24, 1, 11, 10; 12; 13, pr.

[4] D. 24, 1, 43.

[5] D. 24, 1, 40–2, citing a constitution of Antoninus Pius. The purpose of the gift *honoris causa*, from wife to husband, was to enable the latter to bear the expenses of a rank or office. Cf. Ulpian, *Reg.* 7, 1.

[6] D. 24, 1, 7, 8 and 9; 8; 9. The thing given was the slave. There was presumably an enrichment by the accrual of rights of patronage to the donee. Validity was due to *favor libertatis*.

[7] D. 24, 1, 14.

moderate presents on birthdays or other festive occasions, such as the first of March, were allowed to stand.[1]

With all these exceptions, little substance was left to the prohibition. It might still serve a useful purpose as a check, to be judiciously applied, upon excessive generosity. This was the light in which Paul regarded it—'et sane non amare nec tamquam inter infestos jus prohibitae donationis tractandum est, sed ut inter conjunctos maximo affectu et solam inopiam timentes.'[2] Such transactions as did fall under the prohibition were void *ab initio*. The donor remained owner and might reclaim his gift by *vindicatio* if the object was still extant: if it had been consumed he was given a *condictio* for the amount of enrichment. Where the forbidden liberality took the form of a promise or of a release from debt, it had no legal force, not creating even a natural obligation.[3]

Succession between husband and wife.

As the wife in free marriage did not become an agnate of her husband, there was no right of intestate succession between them at civil law. Nor was there any ground for including them in the praetorian class of cognates. The edict therefore made a special place for them, granting *bonorum possessio unde vir et uxor*, when all the preceding orders, *liberi*, *legitimi*, and *cognati*, failed.[4] This *bonorum possessio*, though it is not mentioned in Novel 118 whereby Justinian reformed the law of intestate succession, probably survived that reform.[5] Novel 53, c. 6, A. D. 537, gives the surviving consort left without resources the right of intestate

[1] D. 24, 1, 31, 8.
[2] D. 24, 1, 28, 2.
[3] D. 24, 1, 1, 10; 5, 18; 6; 7, 8 and 9.
[4] D. 38, 11. *Inst.* 3, 9, 3–7.
[5] Cf. Girard, *Manuel*, 864, and Buckland, *Text-Book*, 391, note.

succession to one-quarter of the defunct consort's estate. In A. D. 542 this right was restricted to the poor widow, and if there were children of the marriage she received only the usufruct of her portion, which was reduced to a *virilis portio* when her husband had four or more children. The later enactment, Nov. 117, c. 5, mentions one hundred *auri librae* as the maximum receivable under the earlier Nov. 53,[1] but the text leaves us uncertain whether this limit was retained in the amended law.

In the matter of testamentary succession there seems to have been no special restriction upon husband and wife under the Republic. Mere legacies from one to the other were even privileged, for they were unaffected by the *lex Furia testamentaria*, if it be true that that enactment adopted with extensions the list of *exceptae personae* set out in the *lex Cincia*.[2] But there is no mention of such exceptions in the *lex Voconia*. The wife, then, was subject to the general restriction preventing the institution of women by testators placed in the first class of the census, and legacies from one consort to another must not exceed the amount left to the heir.[3] The first provision of the *lex Voconia* ceased to be applied with the abandonment of the *census* early in the Empire; the second had already been replaced by the *lex Falcidia* of 40 B. C.

Unless they were related in a degree not more remote

[1] This maximum is not mentioned in Nov. 53, c. 6, but it is in C. 5, 11, 1 a (penalty for divorce of undowered wife), a law also amended by Nov. 117, c. 5. Its apparent application to the surviving consort may be due to faulty drafting.

[2] F. V. 301, which, it must be admitted, mentions specifically only the adoption of the list of excepted cognates.

[3] Cf. Girard, *Manuel*, pp. 833 and 934.

than the sixth, childless couples were limited by the *lex Papia Poppaea* of A. D. 9, in their *jus capiendi inter se*, to one-tenth of the bequest.[1] This meant, as Puchta pointed out,[2] that either could take less under the will of the other than under that of a stranger. Attention is called in Quintilian, *Inst.* 8, 5, 19, to the striking anomaly that a man might leave one-fourth of his estate to a mistress and only one-tenth to his wife. One living child gave the parents full capacity as also did a deceased son or daughter who had reached the age of fourteen or twelve respectively. One child dying after the ninth day added one-tenth, two added two-tenths, and three gave full capacity. Each surviving child of a prior marriage gave an additional tenth. Over and above the tenth in property, a childless surviving consort might be left the usufruct of as much as one-third of the testator's estate. Exemption from the application of the law might be obtained by imperial grace, and it did not affect couples of whom the husband was under twenty-five or over sixty, or the wife under twenty or over fifty. On the other hand, if the husband and wife belonged to classes whose intermarriage was forbidden by the *lex Julia et Papia*, there was no *testamenti factio* at all between them.[3]

All this part of the *lex Papia Poppaea* was repealed by Honorius and Theodosius in A. D. 410[4] in an enactment which leaves the consorts free to bequeath their whole property to one another.

[1] Ulpian, *Reg.* 15 and 16. Cf. P. Oxy. xvii, 2089 with Levy's notes in Z. S. St. 48, 1928, pp. 549–51. Note the exemption of *legatum dotis*.

[2] *Institutionem*, § 313.

[3] For certain minor amendments by *S. C. Claudianum*, *S. C. Persicianum* (?), and *S. C. Calvisianum* see Ulpian, *Reg.* 16, 3.

[4] C. 8, 57, 2.

Succession between mother and children.

Children of the marriage without *manus* had long no right of intestate succession to their mother, to whom their relation was purely cognatic. As cognates of the first degree, they were entitled to *bonorum possessio unde cognati* if their mother died without *agnates* or other *heredes legitimi*. It was also solely in this praetorian class of cognates that the mother not subject to *manus* might succeed *ab intestato* to her children. The mother first was relieved from this harsh if logical rule, the *senatusconsultum Tertullianum* of Hadrian's reign bringing her into her children's succession after *liberi*, *pater* and *frater consanguineus*, but with a *soror consanguinea* and before any other agnates.[1] As for the children, they were admitted to the mother's succession by the *senatusconsultum Orfitianum* of A.D. 178, in preference to all her agnates.[2]

The caducary laws.

The *lex Julia* of 18 B.C. and the *lex Papia Poppaea* of A.D. 9, commonly cited together as the *lex Julia et Papia*, attached material disabilities to celibacy and childlessness. The most serious of these was the total or partial withdrawal of the right to accept a testamentary succession from any but a relative by blood or marriage. The combined effect of the two statutes was (*a*) that unmarried men between twenty-five and sixty and unmarried women between twenty and fifty could take nothing under a will unless the testator was a cognate of the seventh degree at furthest or an ally by marriage:[3] (*b*) that between the same ages a childless married man

[1] Ulpian, *Reg.* 26, 8. Until the amendment mentioned in Justinian's Institutes 3, 3, the *ingenua* must have three children and the *libertina* four to qualify for succession under *S. C. Tertullianum*.

[2] *Inst.* 3, 4.

[3] F. V. 216–19. See above, pp. 118–19, for special limitations under *lex Papia Poppaea* between husband and wife.

or woman could take only half of what was devised.[1] The incapacity is to be distinguished in every case from a lack of *testamentio factio*. The *caelebs* or *orbus* may be validly instituted or named legatee and may be placed in a position to take advantage of the disposition in his favour by marriage or by the birth of a child at latest within the hundred days following the opening of the testament.[2]

The penalties of celibacy were abrogated by Constantine in A. D. 320.[3] The same constitution restored to childless persons their complete right to accept bequests from a testator other than wife or husband. The provisions of the *lex Papia Poppaea* concerning the testamentary rights of husband and wife *inter se* survived almost a century, until repealed by Honorius and Theodosius.[4]

[1] G. 2, 286[a], Paul, *Sent.* 4, 9, 1 and 7. One child was sufficient to avoid the penalties of *orbitas*. This was not a case of *jus liberorum*. The *jus liberorum* exempted the parent from the penalties of celibacy for failing to remarry. See Jörs, *Verhältnis* &c., pp. 33–5.

[2] Ulpian, *Reg.* 17, 1. [3] C. 8, 57, 1. [4] See above, p. 119.

CHAPTER V

MATRIMONIAL RIGHTS AND DUTIES

1. Society.

THE wife under *manus* occupies a legal position which, apart from certain differences already noticed, is that of a daughter. In practice she is *materfamilias* and *domina*, mistress of the household of which her husband is master and associated with him in the exercise of the domestic religion. The wife of the *flamen Dialis* is, under *jus sacrum*, a necessary participant in certain public sacrifices.[1] But in the private law of persons the titulary of *manus* has nearly the same right over his wife as over a child. She owes implicit obedience, and until a comparatively late date can do nothing of her own accord to loosen her bonds. Where the husband is not himself *in potestate*, there is no third party who may separate them: against any interference with his control he has the same remedies as in regard to *filiafamilias*.

Compared with this autocracy, the husband's position in free marriage is decidedly a weak one. To begin with he must accept the fact that his bride, if *filiafamilias* before marriage, remains subject to the *patria potestas* of her father, whose powers over her appear long to have remained unrestricted. Not until the time of Antoninus Pius or Marcus Aurelius is *pater* prohibited from breaking up, by a capricious divorce on his own initiative, a 'bene concordans matrimonium'.[2] Even then the jurists are reluctant to admit that the union

[1] Plutarch, *Q. R.* 50. And see Pauly-Wissowa s.v. Flamines.

[2] Paul, *Sent.* 5, 6, 15. C. 5, 17, 5. D. 43, 30, 1, 5. Nov. 22, c. 19. Paul is the only one to mention Antoninus Pius in this connexion.

survives, as *matrimonium legitimum*, a *repudium* sent by a father against the will of his daughter. Paul in F.V. 116 thinks that the marriage is 're *ipsa jure solutum*', but that *pater* cannot withdraw the woman from her husband's house or reclaim her dowry unless she consents.[1] The Antonine constitution operates therefore simply as an *exceptio* against the *interdictum de liberis exhibendis* or *ducendis* instituted by *paterfamilias*. Ulpian uses language in D. 43, 30, 1, 5,[2] which, though it shows the constitution being used as an *exceptio*, can scarcely be interpreted otherwise than as meaning that this defence prevented the paternal *repudium* from taking effect and so saved the marriage. C. 5, 17, 5, which reproduces Diocletian's interpretation of the Antonine constitution, seems clearly to have this meaning: it lays down the rule 'patris . . . ratam non haberi voluntatem', which denies all validity to the father's intervention unless it is occasioned by 'magna et justa causa'. In view of Paul's statement in F. V. 116, it may be questioned whether Marcus' enactment

[1] According to Solazzi, *In Tema di Divorzio*, *Bull.* 34, p. 13, the marriage is dissolved and the *filia* remains with her former husband as a concubine. Contra, Levy, *Ehescheidung*, pp. 145–7, who denies dissolution in harmony with his thesis that the classical law recognized no divorce without actual separation. Levy discards the restoration 'ipsa jure solutum', replacing it with 're (spectu patris solutum)' finding support in D. 24, 1, 32, 19, where Ulpian declares that the marriage endures except 'quod ad ipsos'. But the last six words of F.V. 116 are an insuperable obstacle to Levy's restoration. Surely there could have been no question of a restitution of dowry, unless a case could be made out for dissolution. To my mind the sources show simply juristic doubt, only ended by Diocletian, as to the meaning of the constitution of Marcus and the consequent status of the consorts.

[2] The end of the passage—'quod tamen sic erit adhibendum, ut patri persuadeatur, ne acerbe patriam potestatem exerceat'—is justly condemned by Eisele, Z. S. St. 13, 1892, p. 130 as 'völlig unrömisch'.

—if it was his and not his predecessor's—meant to go so far. Ulpian's account in D. 43, 30, 1, 5, and D. 24,1, 32, 19, if not interpolated, may represent merely his own opinion on a doubtful point. The clear recognition that the *repudium* sent by *pater* without complete justification was void was quite likely the work of Diocletian himself. His rescript goes on to point out that the divorce of an emancipated daughter was entirely outside the competence of her father, an addition which confirms the opinion that that of a *filia in potestate* could still be effected by him for adequate reason.[1]

The *paterfamilias* who detains a *filiafamilias uxor* lays himself open to an interdict *de uxore exhibenda* or *ducenda*, according to Hermogenian in D. 43, 30, 2. Hermogenian is a fourth-century jurist,[2] and the matrimonial as opposed to the patriarchal household has apparently made headway. Presumably *paterfamilias* might still successfully plead *magna et justa causa*, and in any case no woman could be compelled against her will to return to her husband's house.[3] Normally, however, the husband has a right, good against *paterfamilias* as against strangers, to the society of a willing wife. More than this it is impossible to say. There is no trace of anything corresponding to

[1] Solazzi in *Bull.* 34, 1925, pp. 8–27 finds interpolation not only in D. 24, 1, 32, 19–20. 43, 30, 1, 5. C. 5, 17, 5, but also in Paul, *Sent.* 2, 19, 2 and 5, 6, 15. He attributes to the Antonine constitution nothing more than the *exceptio* against the paternal interdict *ad exhibendum*, and makes the nullity of *pater's repudium* later than Diocletian, but earlier than Justinian.

[2] Karlowa, *Röm. Rg.* 1, 754. Lenel, *E. P.*, p. 488, n. 4, considers the interdicts *de uxore exhibenda ac ducenda* a late development.

[3] C. 5, 17, 5, 1.

our proceedings for the restitution of conjugal rights against the wife herself.[1]

The wife *sui juris* was not liable to paternal interference. As for the guardianship to which she was perpetually subject until the late Empire, that had nothing to do with her person, amounting as it did to little more than a formal participation in a limited number of legal acts touching her separate estate. Dowry constituted by *dictio* or *promissio* or by the *datio* of *res mancipi* would require *auctoritas tutoris*,[2] but once handed over it was administered by the husband, and the household was in this, as in all other respects, outside the province of the wife's guardian. Whatever their relations might be, he had no more power than a complete stranger to separate the couple.

2. *Reverentia.*

Husband and wife owe to each other a respect and a kindness which cannot indeed be directly enforced by action, but which have other important legal consequenses. This duty may conveniently be described as *reverentia*, in the language of a suspected passage from Ulpian,[3] provided we bear in mind that it is mutual. So long as the marriage lasts, they may not institute penal or defaming actions against one another,[4] and even after separation the *actio furti* for things appropriated in contemplation of divorce is replaced *in*

[1] Even the *patronus* could not compel his *liberta* wife to return to him. Levy, *Ehescheidung*, p. 16, n. 6, and pp. 137 et seq.

[2] G. 1, 178. Ulpian, *Reg.* 11, 20. Paul in F. V. 110.

[3] D. 24, 3, 14, 1. Whether the last twelve words are to be ascribed to the compliers, as Pampaloni, *Beneficium Competentiae*, suggests (Cf. Solazzi in *Bull.* 34, 1925, p. 301, n. 2; and Guarneri Citati in *Bull.* 33, 1923, p. 128; for the view that *reverentia* is not a word used by the classical jurists.), or were written by Ulpian, is of no importance for our present purpose. See also C. 5, 13, 1, 7—'reverentia maritalis'—and D. 32, 41—'affectio et pietas'.

[4] C. 5, 21, 2. D. 25, 2, 2.

honorem matrimonii by the less drastic *actio rerum amotarum*.[1] In any proceedings for breach of contract, the defendant consort or father-in-law has *beneficium competentiae*.[2] The wife suing after dissolution of the marriage for the recovery of her dowry owes the *beneficium* to her husband or father-in-law though not to their heirs, and the husband at least cannot contract himself out of this advantage.[3]

The principal guarantee of mutual consideration was the facility of dissolving the free marriage. Even when the Christian Emperors began to impose penalties upon capricious divorce, the reasons specified as conferring exemption from the penalties bear witness to the duty of conjugal respect. Thus the husband who beats his wife or consorts with unchaste women in the matrimonial domicile may be repudiated with impunity.[4] The husband is none the less still acknowledged master in his own house, and his wife must obey his reasonable commands. Something of the old standard of conduct for a *materfamilias* appears in the well-known constitution of Theodosius and Valentinian of A. D. 449. The wife who dines with other men without her husband's knowledge or consent, who attends the theatre or the games against his bidding, who without sufficient reason spends the night out, may be divorced without

[1] D. 25, 2.

[2] D. 42, 1, 20–24. For an occasional exception when a promised dowry is claimed, after dissolution of marriage, from the wife's father, see D. 23, 3, 84 and Czyhlarz, *Dotalrecht*, pp. 111–12.

[3] D. 24, 3, 12–16.

[4] C. 5, 17, 8, 2. In Nov. 117, c. 14, Justinian declares that whipping shall no longer justify divorce. The husband may whip with impunity for any of the reasons justifying divorce, but if no such reason exists is liable to a penalty equal to 1/3 the *donatio propter nuptias*.

penalty.[1] A recognition of the conjugal dignity and reserve appropriate even to the freedwoman is contained in D. 38, 1, 48, pr., where Hermogenian denies to the *patronus* or his male descendant who has consented to her marriage the *exactio operarum*.

3. Aliments.

It is a rather extraordinary fact that the texts show no directly enforceable duty of support based upon marriage alone. Under the Empire, ascendants and descendants having the means are under a legal obligation to provide each other with the necessities of life.[2] A husband, too, is at least morally bound to provide maintenance for his wife proportionate to their station. It is upon him that the *onus* of the household lies: the necessity of carrying this burden is the reason for dowry. He may grant his wife a yearly or monthly allowance, which will not fall under the prohibition of gifts. Even the unexpended portion of such allowance may only be reclaimed as an invalid liberality if the amount granted exceeds the revenue of the dowry.[3] Moreover, we have seen that gifts from a consort for certain purposes such as the reconstruction of a house or the acquisition of a public office were allowed to stand.[4] The moral obligation of assistance was thus not devoid of indirect legal consequences. But there is no evidence of anything in the nature of an action or prosecution for non-support, except where there is dowry. A husband wilfully refusing to support a necessitous wife may be judicially compelled to supply maintenance proportionate to any dowry received by him.[5]

4. Fidelity. Matrimonial offences and their punishment.

'If you take your wife in adultery, you may slay her

[1] Cf. 5, 17, 8, 3. Cf. Val. Max. 6, 3, 9–12.
[2] C. 5, 25. Nov. 117, c. 7. D. 25, 3, 4–9. [3] Ulpian in D. 24, 1, 15.
[4] *Supra*, p. 116. [5] D. 24, 3, 22, 8.

with impunity and without trial', says Cato. On the contrary, if she detect you in like case, she may not raise her hand against you.[1] Her companion in crime may be beaten, mutilated, or even killed without fear of consequences.[2]

It is by no means certain that the *jus necandi* existed only in the *manus* marriage, though Esmein would have it so.[3] A man as husband is permitted to go even to these extreme lengths in vindication of his honour. The law at this time did not attempt to limit the immediate expression of his just resentment. That the permitted slaying is to be regarded in this light rather than as an exercise of the power implied in *manus* is indicated by the fact that not merely the guilty wife, but her accomplice as well, may be killed.[4] Free marriage was already common when Cato spoke, and there is nothing in his language to differentiate it from *manus* in this regard.

Apart from this rough and ready justice, the wife may be condemned to death for adultery by a domestic tribunal consisting of her husband and her blood relations.[5] The sentence, instead of death, may possibly be divorce.[6] It seems to follow, however, from the

[1] Aulus Gellius, 10, 23, 5.

[2] For recorded instances of whipping and mutilation, see Valerius Maximus, 6, 1, 13. Note the concluding sentence—'quibus irae suae indulsisse fraudi non fuit.' Quintilian makes frequent allusion to a *lex* permitting the husband to slay both *adulter* and *adultera*. *Inst. Or.* 5, 10, 39 and 88 and 104, 7, 1, 7. 3, 11, 7. *Declamatio* 244. See also Horace, *Sat.* 1, 2, 32 et seq. cited by Esmein, *Mélanges*, p. 80, and *Schol. ad Hor. Sat.* 2, 7, 63 cited Gide, *Étude sur la condition privée de la femme*, p. 135, n. 1.

[3] Op. cit., p. 89. Contra, Gide, op. cit., p. 116.

[4] Indeed Quintilian refers to a law 'quae prohibet adulteram sine adultero occidere.' *Inst. Or.* 5, 10, 104. 3, 11, 7. 7, 1, 7.

[5] Dionysius, 2, 25. Plutarch, *Rom.* 22.

[6] Below, pp. 226–7.

difference in legal relations of husband and wife as between the *manus* and the free marriage, that only in the former could the husband, or his *paterfamilias*, summon and preside over such a court. The example used by Gide[1] to prove domestic jurisdiction in free marriage is anything but conclusive. The trial of Pomponia Graecina was referred to the husband and relatives by special decision of the senate and does not prove that they had this power by common law.[2]

When Plautius held his court in A. D. 56–7, this exercise of marital jurisdiction was already *priscum institutum*. Had it become obsolete only because of the *lex Julia de Adulteriis*, which transferred the cognizance of adultery to a *quaestio perpetua*? Probably not, since, as shown by the texts cited, many matters other than infidelity had been dealt with by the domestic tribunal, could indeed still be dealt with if the rare husband with *manus* cared to have recourse to an old-fashioned institution. Nor is it likely that a thing which had gone out of use under Augustus would be described as *priscus* in the middle of the first century A. D. The husband had ceased being judge because the *manus* marriage was passing away. Such indeed may have been one of the reasons for the *lex Julia*. Where the erring wife was *filiafamilias*, it was quite within the powers of *paterfamilias* to try her, as Esmein suggests.[3] But he

[1] Op. cit., p. 116, n. 1. Tac. *Ann.* 13, 32, year A. D. 56–7, Aulus Plautius Silvanus holds a court over his wife Pomponia Graecina, to deal with an accusation of *superstitio externa*.

[2] See Mommsen, *Strafrecht*, p. 19, n. 3.

[3] Op. cit., p. 76. But I cannot follow Esmein and Gide when they maintain that the *uxor sui juris* might be judged by her relations and her relations alone. We do not know that the women mentioned in Val. Max. 6, 3, 8, and Livy, *Epit.* 48, were not *in potestate*.

might frequently be unwilling to do so. If she was *sui juris*, there was no domestic jurisdiction to apply to. The *lex Julia* would then provide a very necessary check upon the growing independence and recklessness of women.

The husband without *manus* did not have to wait for the *lex Julia de Adulteriis* for all legal means of restraining infidelity or other misconduct on the part of his wife. There was of course always divorce, and to divorce could be attached, just as before the old family court, financial penalties realized at the expense of the *dos*. The *retentio propter mores* and the *actio de moribus* are pre-Augustan.[1] The first constitutes purely material compensation, the husband being allowed to keep one-sixth of the dowry for *mores graviores*, i.e. adultery, and one-eighth for minor offences. Within those limits it is a good answer to the action *rei uxoriae*. The second is procedurally not merely a defence, but, as its name implies, a means of attack. There is, however, nothing to show that success in the action brought with it any material advantage not already attainable by *retentio propter mores*. We are not directly informed as to what could be recovered in a *judicium de moribus*, although it does seem clear that the penalty, whatever it was, was exacted from dowry.[2] The amounts recoverable were evidently fixed, for Paul says that an agreement not to

[1] Pliny relates in *H. N.* 14, 13–4, that Cn. Domitius, sitting as judge, mulcted a woman in her dowry because she had drunk more wine than was necessary for her health. Valerius Maximus, 8, 2, 3 records a decision by C. Marius in a *judicium de moribus* heard in conjunction with the wife's *actio rei uxoriae*.

[2] See the instances cited in note 1, and cf. D. 23, 4, 5, pr. and C.Th. 3, 13, 1, where the action is dealt with in close relation to *dos*. Karlowa's reference (op. cit. 2, 218–19) to D. 48, 5, 12 (11), 3, is doubtful. The case dealt with there seems to me clearly one of *retentio*, not *actio de moribus*.

use the action or one reducing or increasing the penalty to be exacted was void,[1] 'ne publica coercitio privata pactione tollatur'. The last phrase in particular points to statutory regulation. The only information that we have as to fixed penalties relates to the *retentiones*, which were one-sixth of the dowry for *mores graviores* (*adulteria tantum*) and one-eighth for *leviores*, i.e. all forms of misconduct other than adultery.[2] These may have served also in the *judicium de moribus*, but what then was the purpose of this action?

Czyhlarz[3] holds that the sole object was to enforce payment of *retentiones* not obtained, for any reason, when the *dos* was restored. Another suggestion is that the *judicium* was resorted to where *dos* had been promised but never delivered.[4] Karlowa objects[5] that both of these explanations would make its use rare and exceptional. The objection can scarcely be considered a serious one, in view of Justinian's express statement that the *judicium de moribus* was infrequent.[6] Karlowa finds the *rationale* of the action in its character as penal proceedings involving *infamia* for the wife found guilty, in addition to pecuniary damages. His view is supported by the description as *publica coercitio*, and by the fact that the action cannot be brought by or against an heir.[7] These characteristics, in his opinion, mark it as *vindictam spirans*, and promise the outraged husband

[1] D. 23, 4, 5, pr. [2] Ulpian, *Reg.* 6. 12. [3] *Dotalrecht*, p. 33.
[4] Keller, *Institutionen*, p. 187, cited by Karlowa, *Röm. Rg.* 2, 218.
[5] Loc. cit. [6] C. 5, 17, 11, 2 b.
[7] D. 24, 3, 15, 1. C. Th. 3, 13, 1—Note the words 'accuset' and 'crimina' in the *interpretatio*. Cf. Aulus Gellius, 10, 23, 3, 'Marcus Cato non solum existimatas, sed et multatas quoque a judice mulieres refert non minus si vinum in se quam si probrum et adulterium admisissent.'

more satisfaction than a mere money-compensation can afford. The truth perhaps lies in a combination of the three explanations; the action may have served all the purposes suggested. This much seems clear, at any rate, that it was not a mere *praejudicium*,[1] to determine whether the woman had been guilty of misconduct, preliminary to a decision regarding *retentiones*. Gaius, 4, 102, shows that it resulted in a judgement mulcting an unsuccessful defendant. Moreover, as Czyhlarz[2] points out, the judge in the *actio rei uxoriae* was fully competent to decide, in that action itself, upon the facts alleged as justifying retentions. Karlowa's view, that *judicium de moribus* was solely designed to give fuller redress and to provide a more effective repression of conjugal levity or inconstancy by supplying that curtailment of the woman's *existimatio* which the obsolescent domestic procedure had carried with it,[3] is open to the very objection which he makes to the explanations offered by Czyhlarz and Keller. In the nature of things, a husband would rarely go out of his way to obtain so modest a revenge. But the action was a matter of public interest—the husband could not contract himself out of it—and though we have no direct proof, may have resulted in *infamia*. It must have been useful, none the less, as a subsidiary remedy when circumstances prevented retention of a proportion of the *dos*. This would be the case not only where the *dos* had been merely *promissa*, not *tradita*, but where it was *receptitia*, for the *retentiones* were not claimable as against an action on the stipulation.[4]

[1] Keller, cited by Czyhlarz, op. cit., p. 338. [2] Op. cit., p. 338.
[3] Tac. *Ann.* 13, 32 'isque . . . de capite famaque conjugis cognovit . . .'
[4] Cf. Esmein, *Mélanges*, p. 79, and in N. R. H. 1893, p. 154.

On the strength of Ulpian, *Reg.* 6, 13, Esmein[1] believes that the *judicium de moribus* was made available to wives against their husbands by the law which fixed the amount of the *retentiones*. But the penalties detailed in this text show conclusively that the husband's *mores* only came under examination in the *actio rei uxoriae*. By proving his adultery, the divorced woman could exact immediate repayment of that part of the dowry which under ordinary circumstances was recoverable only in instalments,[2] and additional fruits or revenues for the rest. For *mores leviores*, the customary terms of restitution were reduced to six months. Moreover, Gaius specifically labels the *judicium* as *de moribus mulieris*.[3]

Justinian abolished both the *retentiones*[4] and the *judicium de moribus*.[5] They had become superfluous in his general reform of the law governing divorce and the disposition of dowry.

Lex Julia de Adulteriis and its amendments.

The *lex Julia de Adulteriis*,[6] passed between 18 and 16 B.C., was the spearhead of Augustus' attack upon the moral corruption into which Roman society had sunk in the last century of the Republic. Through the generalization of free marriage and the weakening of centralized family government the old restraints upon sexual immorality had become largely ineffective. Augustus, by creating a *quaestio perpetua* to deal publicly not only with adultery but with the miscellaneous group of offences brought together under the

[1] Ibid.

[2] i.e. Quae pondere, mensura, numero continentur. [3] 4, 102.

[4] C. 5, 13, 1, 5. A.D. 530. [5] C. 5, 17, 11, 2 b., A.D. 533.

[6] The *lex Julia* has been studied in great detail by Esmein, *Mélanges*, pp. 71–169, and by Jörs, *Ehegesetze*. For a brief account see Mommsen, *Strafrecht*, Book 4, Section 6.

heading of *stuprum*, and by the enactment of severe fixed penalties for delinquents, provided a more uniform, objective, and efficacious substitute for the obsolescent *judicium domesticum*.

Whether the *lex Julia* explicitly prohibited the judicial cognizance of adultery within the family connexion is doubtful. No such prohibition is spoken of in D. 48, 5, C.Th. 9, 7, C. 9, 9, Paul, *Sent.* 2, 26, or *Collatio*, 4, the *sedes materiae*. The *Scholia ad Hor. Sat.* 2, 7, v. 63, cited by Gide,[1] contain this sentence—'Haec lex abolita est lege Julia, quae jussit adulterii cognitionem ad judices referri', but the writer, whose authority in any case leaves something to be desired, has been speaking of the old *jus necandi*, which the *lex* undoubtedly withdrew from the husband, and may be thinking only of this diminution of the husband's rights in favour of public prosecution. Moreover, there are several subsequent references to the family court. Tacitus[2] records that the Senate kept one case, where the culprit was related to Tiberius, from the *quaestio*, and ordered her family, 'exemplo majorum', to banish her. According to Suetonius,[3] the same Emperor was responsible for an enactment giving jurisdiction to the relatives of 'matronae prostratae pudicitiae' in cases where no one presented himself as public accuser.

[1] *Étude sur la condition privée de la femme*, p. 135, n. 1. [2] *Ann.* 2, 50.
[3] *Tiberius*, 35. Solazzi, *Restituzione della dote*, p. 161, following Voigt, would make this a case of substitution for the jurisdiction of *paterfamilias* when the woman was *sui juris*. It may equally well be regarded simply as provision for the failure of public prosecution, more emphasis being placed on 'quibus accusator publicus deesset' and *propinqui* being taken as including *paterfamilias*. The fact that an enactment was neccessary for the purpose would then confirm the supersession of *domesticum judicium*.

Finally there is the instance from the year A.D. 56–7 already cited, where a husband was allowed to adjudicate 'prisco instituto propinquis coram de capite famaque conjugis' on a charge of 'superstitio externa'.[1] It is worthy of notice that all three passages speak of the measures taken as a revival of an ancient usage, and the exercise of domestic jurisdiction may be regarded as depending upon special authorization.[2] They do not, therefore, negative the view that the *lex Julia* forbade the family to dispose of cases of adultery and *stuprum*. A consideration of the whole economy of the law leads to the conclusion that, whether by express provision or not, the *quaestio perpetua* did in fact supersede the husband's and the *paterfamilias'* tribunals. How else, for example, could the husband who had exonerated his wife be liable under the law, at the accusation of a third party, for *lenocinium*? The exoneration might result from examination by the tribunal summoned by a husband with *manus*, and to treat it as a criminal act would clearly amount to a denial of his competence.

The abolition of the right to kill a wife taken *in flagrante delicto* is probably directly attributable to the *lex Julia de Adulteriis*. The best evidence of this is furnished by Paul's summary of the statute in *Sent.* 2, 26, 4—'Maritus in adulterio deprehensos non alios quam infames et eos qui corpore quaestum faciunt, servos etiam, excepta uxore quam prohibetur, occidere potest'[3]—where 'quam prohibetur' may be taken as referring to an explicit prohibition in the law itself. We

[1] Tac. *Ann.* 13, 32. Page 129 above. The offence dealt with here was of course not adultery, but the passage is useful in showing the degree of jurisdiction which might be accorded.

[2] See Mommsen, *Strafrecht*, p. 19, nn. 2 and 3.

[3] Cf. *Coll.* 4, 3, 1.

may add Papinian's 'aperte contra legem fecisse eum non ambigitur' in *Collatio*, 4, 10;[1] and the note in the second-century *Scholia ad Hor. Sat.* 2, 7, v. 63, quoted above,[2] is at least a confirmation. The husband who disregarded this change in the law and exercised an abolished privilege was liable to the penalties of the *lex Cornelia de Sicariis*,[3] that is to say, deportation or death according as he was *honestior* or *humilior*.[4] But Antoninus Pius and Marcus Aurelius admitted such attenuating circumstances, and allowed a diminution of the sentence to *relegatio in insulam* or hard labour for life.[5]

The *adulter* did not fare so well under the law. A slave, a family freedman, an *infamis* or a condemned criminal detected in the commission of adultery with a wife in her husband's house could still be slain with impunity by the husband provided the latter turned out his guilty spouse and reported the circumstances within three days to the competent magistrate.[6] If advantage was not taken of this liberty, if the crime was detected elsewhere than in the matrimonial domicile, or if the offender failed to answer any of these descriptions, the husband was allowed to detain him for twenty hours in order to call witnesses.[7] But it can hardly have been expected that any man would govern his conduct in the circumstances by such distinctions of character or quality. The liberty to kill certain

[1] The immediately preceding 'nulla parte leg*is* marito uxorem occidere conceditur' is not incompatible with an explicit prohibition. It may well be taken as meaning that there were no particular exceptions to the general prohibition.

[2] Page 134. [3] D. 48, 5, 39, 8.

[4] D. 48, 8, 3, 5. Cf. Mommsen, *Strafrecht*, p. 650.

[5] D. 48, 5, 39, 8. *Coll.* 4, 3, 6. 4, 12, 3–7.

[6] Paul, *Sent.* 2, 26, 4. D. 48, 5, 25, pr. *Coll.* 4, 3, 1–6. [7] D. 48, 5, 26.

adulteri, a characteristic manifestation of the inequality of Roman law, would operate as a statutory defence against a charge of murder: but its availability would usually be, from the husband's point of view, a matter of luck. Here also the severity of the law was tempered by imperial constitution. Though the slain *adulter* was not of the specified low condition, Alexander allowed the sentence to be reduced to exile in a case where the accused had acted at night and under the impulse of just anger. (C. 9, 9, 4.).

The father who detects his married daughter in adultery in his own or his son-in-law's house may kill her with her accomplice, provided she is still in his *potestas* or has passed out of it *in manum mariti*.[1] Such at least is Paul's and Papinian's interpretation in the *Collatio*. According to the excerpts from Papinian in D. 48, 5, 21 and Ulpian in D. 48, 5, 22 and 24, 1, the daughter must be *in potestate patris*, so much so that neither a father who is himself *filiusfamilias*[2] nor an *avus paterfamilias* has this right. The discrepancy is probably due to the compilers of the Digest, *manus* being completely obsolete in their time. Where the father is allowed to kill his daughter, his right to kill the *adulter* is not limited, like that of the husband, to persons of low condition.[3] But he must kill both together—*in continenti, propè uno ictu et uno impetu*—the only time allowed him being that of hot pursuit.[4] If he slew the *adulter* but allowed his daughter to go or

[1] *Coll.* 4, 2, 3, and 4, 7.

[2] In *Sent.* 2, 26, 2, *Coll.* 4, 12, 2, Paul admits that this was literally the law but that in practice *filiusfamilias pater* was allowed to kill.

[3] *Coll.* 4, 2, 5—'Auctoritate quoque *legis* pa*trem* posse interficere vel consularem virum vel patronum suum. . .' Cf. D. 48, 5, 23, 4 . . . '. . . omnem adulterum—'.

[4] D. 48, 5, 24, 4.

so much as delayed unnecessarily in putting her to death, he was guilty of homicide within the meaning of the *lex Cornelia*.[1] The same rule applied, according to Macer in D. 48, 5, 33, where the daughter was slain but her accomplice allowed to go free—'quia lex parem in eos, qui deprehensi sunt, indignationem exigit et severitatem requirit'. Macer adds that, if the letter of the law were observed, severe wounds inflicted on the woman with intent to kill her would not be an answer to a charge of having murdered the man: but the doubt on this point was removed by a rescript of Marcus and Commodus granting impunity. Speaking more generally, it would indeed appear from Papinian's statement in *Collatio*, 4, 9 that the courts were satisfied if the best possible effort had been made to kill both culprits, though one of them contrived to escape.

The father's *jus necandi* was not a creation of the *lex Julia* but a survival of the *vitae necisque potestas* attributed to ancient royal legislation.[2] Papinian, being asked why it was included in the *lex Julia*, replied that the object was not to give *paterfamilias* something that he had already, but to compel him, if he killed the adulterer, to kill his daughter as well. This necessity would make him limit such extreme measures to cases of patent flagrancy. We may add that the law does appear to have given the *paterfamilias* something which he lacked, namely the power to take the life of a daughter who had exchanged his *potestas* for her husband's *manus*. In another place (D. 48, 5, 23, 4) Papinian attempts to answer the question why fathers were allowed to retain a privilege which had been taken away from their sons-in-law. The reason, he says, was that

[1] *Coll.* 4, 2, 6–7. D. 48, 5, 33.

[2] Papinian in *Coll.* 4, 8.

a father would be less easily than a husband carried away by passion to make hasty and unjustified use of the power. But the penalties attached to any exercise of the *jus necandi* outside the conditions strictly defined by the law should have restrained the husband if anything could, and we are tempted to regard this discrimination as another diminution of that marital authority which had almost disappeared before the imperial attrition of *patria potestas* had set in.

The crime which the *lex Julia* was chiefly designed to repress was adultery by married women. The text appears to have used the word *materfamilias*,[1] which in Cicero's time would have included only wives in *manus*. It may be doubted whether in the brief interval *materfamilias* had come to mean any woman who was or had been lawfully married, but that is its denotation in the classical law. Before the end of the classical period, however, the statute had been so extended by interpretation or imperial amendment as to embrace the infidelity of women who were wives only *de facto* or who, being ex-slaves, had become concubines of their patrons.[2] Even *sponsae* could now be convicted.[3]

The fact that a marriage was *injustus* because one of the parties belonged to a class rendered ineligible by the *lex Julia de Maritandis Ordinibus* (18 B.C.) did not make the woman any less liable to immediate execution or public prosecution for adultery.[4] Even where she had been a common prostitute before marriage, she could be punished under the *lex Julia de Adulteriis* for conjugal infidelity, though to consort with such women so long as they were unmarried or widows was no

[1] D. 48, 5, 11, pr. C. 9, 9, 28 *ad fin.*
[2] *Coll.* 4, 5, D. 48, 5, 14.
[3] D. 48, 5, 14, 3.
[4] D. 48, 5, 14, 1; 25, 3.

stuprum.[1] Nor could a wife place herself beyond the pale of the law by joining the ranks of the professional prostitutes and making a declaration to that effect before the aediles, or by becoming an actress. The declaration had formerly constituted a safeguard against punishment, but Tacitus in *Ann.* 2, 85, records that in the year A. D. 19 the Senate enacted a decree closing this profession to women of equestrian descent. In the same chapter he recounts how the senate demanded reasons of one Titidius Labeo for his failure to prosecute his wife Vistilia, a woman of praetorian family, who had become a prostitute with the usual declaration. They appear then to have dealt with the case themselves, condemning the woman to *relegatio in insulam*. Yet from what Papinian says in D. 48, 5, 11, 2, it would seem that a *senatusconsultum* had been necessary to make clear the right to proceed against a woman who enrolled herself as an actress or prostitute with the object of evading the penalties of the *lex Julia de Adulteriis*.

To sum up, the penalties of adultery came to be applicable to wives of every condition, to alien women with whom a Roman citizen cohabited *maritali affectu*, and to at least one type of concubine, namely the

[1] D. 48, 5, 14, 2. *Stuprum* is not a matrimonial offence, and will therefore not be separately dealt with. Since, however, there will be frequent occasion to mention it incidentally in what follows, it may be defined here as sexual relations, outside marriage or recognized concubinage, with a free woman who is not engaged in prostitution or some other despised occupation such as tavern-service. It could be committed by a married or unmarried man or an unmarried woman. In married women the offence was adultery. Both parties were liable on conviction under the *lex Julia* to *relegatio*, subsequently to the death penalty. D. 48, 5, 35; 14, 2; 13. C. 9, 9, 28. Paul, *Sent.* 2, 26, 11–13. D. 25, 7, 3. C. 9, 9, 22.

libertina living with her patron. In the passage attesting the last-mentioned extension, D. 48, 5, 14, pr., Ulpian suggests a criterion. The woman entitled to be called *matrona* is always within the scope of the law. How wide this description must have been is apparent from the preceding paragraphs. When we come to the age of Constantine, however, there seems to be some tendency to narrow the application of the law. According to Constantine, the object of all the legislation on the subject is to make the relatively decent woman more resistant to temptation.[1] The irregularities of persons of very low condition were not contemplated. His constitution, C. 9, 9, 28, mentions specifically the waiting-woman employed in taverns, but its provision may be considered, as Esmein holds, to apply *a fortiori* to prostitutes and procuresses.[2]

No man could be prosecuted solely because, being married, he had had sexual relations with a woman other than his wife. In other words, mere adultery as it is understood in modern law was not an offence on the part of a husband within the meaning of the *lex Julia de Adulteriis*. It is true that a married man, like a bachelor, might render himself liable to the full penalties of the statute by participating in the adultery of a married woman[3]—the *adulter* with whom we have been dealing is the paramour married or unmarried—or by committing *stuprum*. But in such cases his wife was debarred from prosecution, even after dissolution

[1] The 'et matrisfamilias nomen obtinenti' which appears in Justinian's Code is not to be found in the corresponding C. Th. 9, 7, 1. This title was probably still in Constantine's time a more respectable one than 'matrona'.

[2] *Mélanges*, p. 98.

[3] D. 48, 5, 2, pr.; 16, 1–9 and *passim*.

of the marriage, by the rule that no woman could act as accuser in public proceedings except for the murder of a parent, husband, child, or patron, or for the forgery, concealment, or defacement of certain wills.[1]

The *lex Julia*, while it left the husband's infidelity unpunished, gave further impetus to the prosecution of the unfaithful wife by penalizing the husband who did not divorce his spouse taken in adultery. His condonement counted as *lenocinium* and rendered him liable to the penalties imposed for adultery. But he was bound to divorce only when he had discovered the crime in commission.[2] His complaisance in other circumstances was not punishable, unless indeed he was deriving profit from it, conduct which was justly regarded as a particularly heinous form of *lenocinium*.[3]

To marry a woman condemned of adultery or of *stuprum* was also to lay oneself open to prosecution under the law.[4] So long as the normal sentence was relegation, as it was in the classical period, this offence, which was also classified as *lenocinium*,[5] may have been not infrequent. There must have been many Roman citizens in the *insulae*, and *relegati* and *relegatae*, retaining as they did their civil rights, were capable of marriage. One of the *leges Juliae* forbade *ingenui* to marry women taken in adultery or condemned on a criminal charge:[6] but, as we have seen, such marriages were not void, the jurists having interpreted the *lex* in question as *minus quam perfecta*.[7] Condemnation for

[1] D. 48, 2, 1, and 2.
[2] D. 48, 5, 30, pr.
[3] D. 48, 5, 30, 3 and 4.
[4] D. 48, 5, 30, 1.
[5] C. 9, 9, 9. This constitution of A. D. 224 is suspected of interpolation because it mentions the death penalty which Esmein, op. cit., p. 112, thinks later than Alexander.
[6] Ulpian, *Reg.* 13, 2.
[7] Above, p. 35.

lenocinium would not invalidate the union, but it involved forfeiture of property,[1] and the possibility must have added to the deterrent effect of this legislation by diminishing the prospects of marriage or remarriage for the woman guilty of *stuprum* or adultery.

Bigamy was punishable as *stuprum* in a man and as adultery in a woman. The second marriage was essentially void in a monogamistic society.[2] C. 9, 9, 18 (A. D. 258) speaks also of *infamia*, and in C. 5, 5, 2 (A. D. 285). Diocletian threatens unspecified penalties to be meted out by 'competens judex'. Finally, Theophilus, 1, 10, 6, who appears to regard bigamy as a distinct crime in itself, declares that it is punished with death.

All persons who lent their aid for the commission of *stuprum* or adultery, or who took money or other valuables as an inducement not to prosecute, rendered themselves liable to the same punishment as the principals.[3] But principals and accessories were punishable only if they had acted with guilty knowledge. The *lex Julia de Adulteriis* was a statute of modern type. The man or woman who had acted in *bona fide* error or under the influence of fraud, and *a fortiori* the woman who was violated, had a good defence. According to Ulpian in D. 48, 5, 13, the text ran—'ne quis posthac stuprum adulterium facito sciens dolo malo'.[4]

Divorce must precede any accusation of *adultera* or *adulter* by a husband, and no other person may institute proceedings against an undivorced woman or her accomplice unless he has first secured a conviction of

[1] See below, p. 146.
[2] D. 48, 5, 12, 12; 44. C. 5, 5, 2. 9, 9, 18.
[3] D. 48, 5, 9; 10; 12; 13; 15; 30, 2.
[4] Cf. D. 48, 5, 40, pr.; 44; 12, 12; 14, 7.

lenocinium against the husband.[1] During sixty *dies utiles* following divorce the husband and father of the woman have the exclusive right of prosecution, the former being preferred in case of conflict. Whether the father's privilege depended on continuing *potestas* or not was a matter of some doubt, Scaevola, in D. 48, 5, 15, 2, maintaining the affirmative and Papinian, in *Coll.* 4, 7, the negative: but Papinian's pre-eminent authority probably settled the question. The *jus mariti vel patris* freed the prosecutor from the risk of an *actio calumniae* in the case of an acquittal.[2] If husband and father renounced their privilege, the better opinion was that proceedings might be taken at once by any one. In any case, after the sixty days reserved for accusations *jure mariti* or *jure patris*, there remained four *menses utiles* for accusations *jure extranei*. Where several prosecutors presented themselves, the presiding magistrate must nominate one to proceed. The husband or father who had failed to exercise his special right might still act during this period, and it was solely *jure extranei* that a man might prosecute a concubine or a woman with whom he had been living with *affectus maritalis* but without lawful marriage. No accusation would be heard from any one beyond the six *menses utiles* counted from the divorce, or after five *anni continui* counted from the offence. Five years was also the period of prescription for *stuprum* and *lenocinium* and all other offences under the *lex Julia* except

[1] D. 48, 5, 12, 10; 27, pr. C. 9, 9, 11.

[2] This is clearly true for the *jus mariti*—*Coll.* 4, 4, and D. 4, 4, 37, 1. For the *jus patris* it is asserted in *Coll.* 4, 4 and denied in D. 48, 5, 31, Paul being the author of both passages. Is the *non* in D. 48, 5, 31 an interpolation indicating that the father had lost this privilege, possibly in the legislation of Constantine? See below, pp. 145–6.

violation, whether of a male or a female, which as *vis publica* could be prosecuted at any time.[1]

Where a marriage was dissolved by the husband's death, the father of the widow had no priority: any one might at once institute proceedings against her for adultery committed during the marriage. Here, however, the six months were counted from the offence, which means that the right to prosecute a widow was subject to absolute prescription in six *menses utiles*.[2]

The remarriage of the woman divorced for alleged adultery imposed fresh conditions upon her prosecution. Unless the accuser had before her remarriage sent her a *denuntiatio* proclaiming his intention to prosecute, he must now secure the conviction of the *adulter*. Failure to proceed against the latter, or his acquittal, made any action against the woman impossible so long as the marriage endured. The only circumstances, apart from the *denuntiatio* preceding the second nuptials, which relieved the accuser of this necessity, was the death or inaccessibility of the *adulter*.[3] The law did not permit the simultaneous prosecution of both offenders.[4] The fact that liberty to choose between the two was restored when the marriage came to an end[5] shows pretty clearly that the rule was designed to protect the second household from unjustified disturbance.

Very considerable changes were made in the law under the late Empire. Constantine (C. Th. 9, 7, 2. C. 9, 9, 29) limited the right of accusation to the husband

[1] The rules stated in this paragraph are derived from D. 48, 5, 2, 8 and 9; 3; 4, 1; 12, 6; 12, 10; 15, 2; 16, 5; 27, pr.; 30, 5–9; 31, 1. D. 48, 16, 1, 10. C. 9, 9, 6; 11.

[2] D. 48, 5, 23, 1; 30, 5.

[3] D. 48, 5, 2, pr.; 17; 18, pr.—6; 19; 20; 40, 3. C. 9, 9, 12.

[4] D. 48, 5, 16, 9.

[5] D. 48, 5, 20, 3.

and near relatives of the adulteress, on the ground that virtuous households were too frequently disturbed in this manner by irresponsible outsiders. At the same time the husband was declared to be the natural defender of the honour of his house, and his preference as prosecutor was freed of its earlier limitation in time. In Novel 117 c. 8, Justinian inverted the order of events by decreeing that adultery could be urged as a legitimate cause for divorce only after the wife or her paramour had been convicted. The punishment also changed with the progress of time, becoming more severe in response to the Christian detestation of adultery. Under the statute itself the penalty for the woman had been *relegatio in insulam* with the loss of one-half of her dowry and one-third of any separate property. Her accomplice was relegated to a different island and lost one-half of his property.[1] In the time of Constantine, if not earlier,[2] both are sentenced to death,[3] but Justinian enacts that, while the supreme punishment shall continue to be meted out to the *adulter* and to persons lending their assistance, the woman shall be let off with a scourging and inclusion in a nunnery. At any time within two years she may be taken back by a forgiving husband, but failing that must take the veil.[4]

[1] Paul, *Sent.* 26, 14. Confiscation of dowry for adultery is obsolete by the time of Justinian, possibly by that of Theodosius and Valentinian. Esmein, *Mélanges*, p. 165. Solazzi, *Restituzione della dote*, p. 80, n. 1 and p. 308, n. 2. The *lex Julia de Adulteriis* does not appear among the laws enumerated in D. 48, 20, 3, as providing for *publicatio dotis*.

[2] See Alexander's constitution of A. D. 224 in C. 9, 9, 9, which is perhaps interpolated—above, p. 142, n. 5.

[3] C. C. 9, 9, 29, 4. C. Th. 11, 36, 4. In Nov. 134, c. 10, Justinian speaks of 'poenas . . . quas Constantinus divae memoriae disposuit,' which is some evidence for the view that the death penalty was introduced by Constantine.

[4] Nov. 134, c. 10.

PART III

MARRIAGE CONTRACTS

CHAPTER VI

DOWRY

1. Definition and origin.

IN its essential character and purpose dowry is a contribution from the wife's side to the expenses of the household. Under all its local and historical variations of form, legal position, and devolution, this common destination is apparent. As an incident in the establishment of the family, it is probably as old as what we may call the civilized forms of marriage themselves. We find it treated in detail by the Code of Hammurabi, mentioned in the Old Testament, carefully regulated in the Law of Gortyn and in Athenian legislation. Cato in his speeches and Plautus in his plays refer to it as a familiar feature of Roman matrimony.[1] Yet as far as Rome is concerned, these last are the earliest mentions, and we nowhere find any reference to dotal provisions in the XII Tables. The decemviral code was of course a brief one, preoccupied to an unfortunate degree with procedural and administrative detail. We therefore cannot take the lack of mention in our very imperfect reconstruction of the

[1] Code of Hammurabi (circa 2084 B. C.) §§ 137–8, 142, 163, 167, 171 b–172 b, 184—ed. Chilperic Edwards, 1921. Old Testament, Judges i. 15; Joshua xv. 19 cited by Edwards, op. cit., p. 113. Law of Gortyn, ed. Bücheler-Zittelmann, pp. 115–17 with references to text. For the *dos* at Athens, see Mitteis, *Reichsrecht*, pp. 232 et seq; in Egypt, Mitteis-Wilcken, *Papyruskunde*, 2, 1, pp. 219–24, and P. M. Meyer, *Juristische Papyri*, pp. 42–3. Cato, ed. Jordan, p. 54, from Aulus Gellius, 17, 6. Plautus, *Trinummus*, Act 3, sc. 1. v. 11; sc. 2, v. 63 et seq.

Tables as proof of the non-existence of the institution. Some form of dowry had been in use at Rome long before the time of Cato and Plautus, and in view of the Babylonian and Greek precedents it can scarcely be doubted that this was simply one outcrop of an inheritance common to the Semitic and Aryan races. The fact that in Roman law the *dos* technically belonged to the husband, while in the earlier legislations it was the property of the wife, as it continued to be in Egypt after the Roman occupation,[1] is far from sufficient to betoken a distinct origin.

The silence of the surviving fragments of the XII Tables in the matter of dowry may be accounted for by the fact that, at least where there was *manus*, the *dos* became the absolute property of the husband. No special rules were necessary: it became confused with the rest of his estate. Even as the free marriage developed this may have long continued to be the case. According to the account given by Servius Sulpicius, the contemporary and friend of Cicero, which has come down to us in Aulus Gellius, 4, 3, 1–2, there were no *cautiones* or *actiones rei uxoriae* until late in the third century B.C. They became necessary then in consequence of the increasing frequency of divorce, with the ensuing hardships to the discarded wife. Even after this time references to dowry and the wife's interest in it on dissolution of marriage are lamentably scanty until the age of the great jurists and, such as they are, they frequently leave us uncertain whether the parties had been united with or without *manus*.[2] There is, however,

[1] See the Edict of Tiberius Alexander, Prefect of Egypt, A.D. 68, in Girard, *Textes*, p. 174. Cf. Mitteis—*Reichsrecht*, pp. 242–4.

[2] The texts are Plautus, *Trinummus*, Act, 3, sc. 1, v. 11; sc. 2, v. 63;

a passage of Cicero, *Top.* 4, 23, which makes it fairly certain that the woman *in manu* had in his time the same right to recover her dowry as the *uxor* of the free marriage, and further that property accruing to her husband by virtue of *manus* was subject to the dotal regime—'Cum mulier viro in manum convenit, omnia, quae mulieris fuerunt, viri fiunt dotis nomine.'[1]

When the woman *sui juris* enters into *manus* she carries with her to the bridegroom or his *paterfamilias* all her rights *in rem* and *in personam* which are not extinguished by the *capitis deminutio*.[2] There is no need to constitute a special *dos*, the same purpose being served by the automatic operation of the law. Of course, any friend or relation might in addition dower her, and such dowry might be made the object of special stipulation governing its devolution. We have seen that even the woman's own property, which passed automatically, was eventually treated as dowry: but it can scarcely have been made *dos recepticia*, for no legally valid contract could exist between parties standing in the relation of father and daughter.

On the other hand, the *filiafamilias* had no property of her own, and any contribution to her proposed ménage must be specially made for her. In a society where marriages were normally arranged by parents for their daughter and celebrated as soon as convenient after puberty, this would be the more common case. Here the husband's acquisition was not an effect of *manus* but of the actual conveyance, and there would be

Aulus Gellius, 10, 23; 17, 6. In this second speech it is clear that Cato is speaking of a free marriage. The woman has separate property. Pliny *H. N.* 14, 13–14; Val. Max. 8, 2, 3.

[1] Cf. F. V. 115. [2] G. 3, 83.

no reason why the final disposition of such dowry should not be regulated by stipulations accompanying its constitution or, failing such stipulations, by customary rules applying also to contributions made in free marriage. It was probably in connexion with these special settlements, necessary where the bride was *filiafamilias* or where the union was without *manus*, that the *cautiones* and *actiones rei uxoriae* came into practice and the elaborate rules of dowry grew up, to be extended subsequently to the property brought in by the woman *sui juris* marrying with *manus*.

I take the passages, Aulus Gellius, 10, 23, Pliny, *H. N.*, 14, 13–14, and Valerius Maximus 8, 2, 3—the first of which reproduces part of a speech made by Cato probably in the first half of the second century B.C., while the others record decisions of the late second or early first century B.C.—as referring, all of them, to ordinary courts dealing with matrimonial disputes. The two latter are obviously not instances of domestic jurisdiction, and the order of the words in the first points to the non-domestic *judex* as the least strained interpretation. If this view is correct, the *actio rei uxoriae* was in use early in the second century B.C., and the *actio de moribus mulieris* not much later.[1] Cato's

[1] I have paid scant attention to the vexed question of the origin and inter-relation of the *cautio* and *actio rei uxoriae*, which has formed the subject of many special studies. Of these the best known are Gide,—*Du Caractère de la Dot en Droit romain*, appended to the 2nd ed. of his *Étude sur la Condition Privée de la Femme*, 1885; Esmein, *La Nature Originelle de L'Action rei uxoriae*, N. R. H., 1893, p. 145; Pernice, Z. S. St. 1899, p. 130; Solazzi, *Restituzione della dote*, 1899. The problem involves too many unknown quantities for fruitful discussion, among others the date of the *lex Aebutia*, but if this is as late as recent authorities are disposed to place it, I am inclined to take Pernice's view that the *actio* was not created by the praetor but taken over by him

language, like that of the two other texts, is wide enough to include both types of marriage, *manus* and free. The same is true of the three records concerning the restoration of dowry to the wife of L. Aemilius Paulus in 150 B.C.,[1] and of the decision rendered by P. Mucius Scaevola in the suit brought by Licinnia, wife of C. Gracchus.[2] As Girard[3] observes, it is impossible to say definitely that the first of these was not a *legatum dotis*; while the second may have been either an action on a *cautio* or an *actio rei uxoriae*. What they do demonstrate is the existence of a well-developed dotal system more than a century before the imperial epoch; and the absence of limitation, in a period when *manus* must still have been frequent, at least suggests that the system applied equally to the older form of union. By the time of Cicero[4] the *retentiones propter liberos* are a familiar institution and the law of dowry is already a matter of detailed regulations, worthy of the treatise devoted to it by his friend Servius Sulpicius.[5]

Enough has been said to show that *dos* and the legal rules governing it must not be regarded as essentially

from customary law. To achieve consistency, Girard is forced (*Manuel*, p. 970, n. 1) to take Gellius 10, 23, 3, as a reference to *judex domesticus*, which puts an artificial construction on the passage. Assuming the usual order of development, the *cautio* with an action on the stipulation would come first, and the *actio rei uxoriae* would then be added to provide for cases where equity demanded restitution in spite of the absence of *cautio*. Its first application may well have been penal, mulcting the husband for capricious divorce and at the same time making some provision for the future of the repudiated woman.

[1] Polybius, 18, 18; 32, 8. *Epit.* Liv. 46. Plutarch, *A. Paulus*, 4, cited by Esmein, op. cit., p. 165.

[2] D. 24, 3, 66, pr. [3] *Manuel*, p. 970, n. 1. [4] *Top.* 4, 20.

[5] Aulus Gellius, 4, 3, 1–2; D. 24, 3, 66, pr., where Javolenus quotes Servius on the good faith and diligence required of the husband in his administration of dowry.

products of the later type of matrimony. But it remains true that this complex body of law, as we find it in the separate works of the classical lawyers and in the *Corpus Juris*, is set out and analysed in exclusive relation to the free marriage, and it is in that relation alone that we shall henceforth discuss it.

2. Obligation to constitute dowry.

In the opening scene of Act III of *Trinummus*, Plautus depicts the surprise and indignation of the *senex* when he hears that the prodigal Lesbonicus has betrothed his sister without dowry. Gide[1] cites this in proof of a moral obligation to provide the daughter of the family with a proper establishment. Unfortunately, we meet here the usual difficulty in using the works of the early comedians as representations of Roman life and manners. The Greek model reveals itself in the following scene, when Lesbonicus declares that to give a woman without dowry is to give her in concubinage rather than in marriage. One of the differences between Greek and Roman marriage law is that whereas *dos* was necessary to the validity of the union in the former, it was not in the latter.[2] Clearly, however, Roman society had long before the end of the Republic reached a stage where a desirable marriage for a daughter would ordinarily depend upon her having a suitable *dos*, and such provision was an 'officium paternum'. We cannot confidently use the frequent discussions in Afranius, Plautus and Terence on the subject in proof of these assertions, but their truth is apparent from other records. The circumstantial account given by Polybius, 32, 13, of the way in which Scipio's family carried out his promises of marriage portions to his daughters is evidence in point;

[1] Op. cit., p. 505, n. 2.

[2] Mitteis, *Reichsrecht*, 225 et seq. and 272–3.

and Cicero's arrangements for the three marriages of Tullia and for payment of the instalments of her dowry show the kind of bargaining that went on between parents and suitors.[1] Dolabella is not an ideal husband, but Cicero and Tullia are not wealthy enough to offer the inducement necessary to secure a more brilliant match.[2]

A patently corrupt excerpt from Marcian in D. 23, 2, 19, attributes to a *lex Julia*, or to a constitution of Severus and Caracalla, a clause providing that paternal ascendants who refused to dower women in their *potestas* might be compelled to do so by application to a magistrate. Moriaud's emendation, which has been discussed in the chapter on consent,[3] makes the *lex Julia de Maritandis Ordinibus* give this power to the praetor at Rome, while the constitution enabled the provincial governors to take the same step in their domain. Castelli attributes the legal duty of the *paterfamilias* entirely to legislation by Justinian,[4] but his opinion can scarcely be reconciled with the language of C. 5, 11, 7, 2, 'neque enim leges incognitae sunt, quibus cautum est omni modo paternum esse officium dotes vel ante nuptias donationes pro sua dare progenie'. There were, then, well-known laws establishing the duty, and the constitution of Diocletian and Maximian, A.D. 293, C. 5, 12, 14, which admits that even a mother may in some circumstances be bound to supply a marriage portion, suggests that such laws were already on the

[1] See for example, Letters 187, 1; 407, 2; 411, 1—Tyrell and Purser's edition. [2] Letter 187, 1—'sed inopia cogimur eo contenti esse.'

[3] Above, pp. 64 et seq.

[4] *Scritti Giuridici*, pp. 129–42 (reprinted from *Bull.* 26, 1914, pp. 164–74.) Bonfante, *Corso*, 1, pp. 298–302, adopts the conclusions of Castelli.

statute books in the third century. Moreover, the woman who constitutes dowry for her own marriage, believing herself bound to do so, cannot recover it on discovering her error. Her position as wife is sufficient justification for the act, which is thus placed, as Czyhlarz observes,[1] on the same footing as the performance of a natural obligation.

3. Modes of constitution.

If the statement in *Regulae*, 6, 1, 'Dos aut datur, aut dicitur, aut promittitur', is to be taken as exhausting the possibilities—and from the recurrence of the trilogy in *Regulae* 11, 20, it seems likely that this formula was technically used to cover all the modes of constitution—*datio* must have a much wider denotation than conveyance of real rights.[2] For it may be said in general that any method of making an economically appreciable addition to an estate may be employed in establishing a dowry. Nor are even these terms wide enough unless we understand under 'addition' those acts also which save diminution. Thus the dotal provision may consist simply in the abandonment of a claim based on debt or testamentary disposition, for such abandonment serves the essential purpose—leaves the man, that is to say, in a better position to cope with the economic burdens of matrimony. Now *acceptilatio*, *delegatio* and waiver of legacies are neither *dictio* nor *promissio* and, if they are contemplated in the list, must fall under *datio*. So interpreted, Ulpian's classification suggests a convenient order for the discussion, *seriatim*, of all the acts mentioned in the texts as serving to constitute a dowry.

(*a*) *Dotis datio*—The typical transaction here is the handing over to the man, in property, of money or

[1] *Dotalrecht*, p. 176.

[2] Cf. Karlowa, *Röm. Rg.* 2, 206. Contra, Czyhlarz, op. cit., p. 92.

land. In Greece, and in the Greek-speaking East, φερνή remains the property of the wife;[1] but at Rome *dos* always belongs, from the strictly legal point of view, to the husband. Even at Rome, however, it is popularly regarded as the wife's portion; and we also find jurists describing it as her 'patrimonium', because of the increasingly frequent duty of restoration.[2] Under the late Empire it is gradually assimilated to the Greek institution, for most practical purposes, by a series of enactments that effectually prevent its absorption in the husband's estate.

Real rights other than rights of property may also form the object of the *datio*. Usufruct is frequently mentioned:[3] the Institutes 3, 24, 3, refer to an *emphyteuta* making over his right *dotis causa*;[4] and *superficies* and servitudes were probably also created or transferred for this purpose. The husband becomes titulary of the real right subject to the usual conditions of restoration.

The act of constitution will be precisely that regularly required to create or transfer the right in question. Thus, until late in the Empire, if the object handed over as dowry is *res mancipi*, a *mancipatio* or *in jure cessio* will be necessary, whereas for *res nec mancipi* a simple *traditio* will suffice. The distinction has disappeared, as every one knows, by the time of Justinian, and *traditio* serves for anything corporeal. Under the classical law, servitudes and usufructs would be created by *in jure cessio* or, if the *praedium* was in a province, by

[1] Mitteis, *Reichsrecht*, pp. 231 et seq.

[2] See for husband's ownership D. 23, 3, 7, 3; 8; 9; for wife's interest D. 4, 4, 3, 5 ; and, for the clash of the two ideas, D. 23, 3, 75. C. 5, 12, 30, pr.

[3] E.g. D. 23, 3, 7, 2; 66; 78. 23, 4, 4.

[4] Czyhlarz, op. cit., p. 98, seems to have overlooked this passage.

pacta et stipulationes; under Justinian the latter method is universally valid. What marks the act as dotal in each case is solely the purpose, and it is not even necessary that this should be expressed.[1] It is this purpose, admitted by the parties concerned or proved by *instrumenta dotalia* or any other means, which determines the ultimate disposal of the property and marks it off from the other elements of the recipient's patrimony.

Legatum dotis causa.

Karlowa[2] is scarcely consistent in placing the *legatum dotis* in a category by itself. Gaius, it is true, gives the husband no action against the heir, leaving it entirely to the woman to exact payment.[3] If this interpretation is correct, there is no direct addition to the husband's estate, not even the addition of a personal right against the heir, and the clause in the will cannot strictly be regarded as a constitution of dowry taking effect immediately on acceptance of the succession. Looked at from the point of view of the testator's intention, however, the *legatum* assumes the appearance of a *dotis datio* subject to the further suspensive condition of his daughter's consent to its execution—a normal way of providing a marriage portion which is neither *dictio* nor *promissio*. If we accept Julian's and Papinian's statement of the law, which does give an action to the husband,[4] the latter's assets are at once increased, on acceptance by the instituted heir, by a right *in personam*, and there is no objection to classifying the provision so made under *dotis datio*. There can be little doubt that this decision of Papinian, part of his general system of executing wills as nearly as might be according to the

[1] D. 23, 3, 23.
[2] Op. cit. 2, 206.
[3] D. 30, 69, 2.
[4] D. 23, 3, 48, 1. D. 35, 1, 71, 3.

intention of the testator, was accepted as the rule. As for the moment at which the dowry is constituted, the texts are not such as to compel acceptance of Karlowa's opinion[1] that this only arrives on payment of the legacy. For when Papinian[2] says—'constante autem matrimonio etiam prohibente muliere Titio recte solvetur: hoc enim et mulieris interest, ut incipiat esse dotata'—he is not postponing the constitution until the delivery of the legacy. If the woman could prevent payment to her husband—which the passage denies—the position would have been substantially what Gaius thought it to be; she could, in other words, prevent her parent's dotal arrangement from taking effect and remain for all material purposes 'indotata'. What happens when the legacy is handed over is that the object of the legacy becomes the object of the *dos*, taking the place of the mere right *in personam* against the heir.[3]

There is no record of *legatum per vindicationem* being used to provide a marriage portion. If it was so used—and there seems to be no reason why it should not—it would give an action *in rem* to the husband, for it added a right of property to his estate as soon as the will took effect. After the legislation of Justinian in C. 6, 43, 1, there would no longer be any difference in this respect between the legacy *per vindicationem* and that *per damnationem*.[4]

[1] Op. cit. 2, 206–7. Solazzi, *Restituzione della dote*, pp. 81 et seq., agrees with Karlowa, principally on the ground that if the dowry had been regarded as constituted before payment the husband alone should have had the action. I prefer to take the moment of constitution as that at which a right of action vests in the husband. [2] D. 35, 1, 71, 3. [3] It is in the same sense that I understand D. 30, 69, 2 and D. 23, 3, 48, 1. [4] Cf. *Inst.* 2, 20, 2.

The legacy *dotis causa* was apparently subject to reduction for the purpose of leaving the heir his Falcidian fourth. There is at any rate nothing to suggest that an exception was made in its favour.

Acceptilatio. Dowry might be constituted by the fictitious receipt of a debt due from the husband to the wife or to a third party. The effect of such *acceptilatio* was immediate extinction of the obligation, but this was reinstated if the marriage was dissolved under circumstances giving the wife or the extraneous constituent a right of restitution. Where there was no condition or term, the debt must be paid at once if the object owed was non-fungible, in instalments, if it was fungible. Restoration, that is to say, followed the rules governing dotal restitution generally. On the other hand, the obligation still subject to an outstanding term or condition could be enforced only when the date originally set for payment arrived or the condition was realized. In all cases the guarantees attached to the debt were revived with it.[1]

[1] D. 12, 4, 10. 23, 3, 41, 2; 43, 1–2. Presumably the obligation would be extinguished by destruction of its object without fault on the husband's part—Arg. D. 23, 3, 56, pr. But whether the standard of care was that of the original contract or the *diligentia quam in suis* of dotal relations in general is a matter of conjecture into which I have refrained from entering. Nor is it very important to decide what the dotal object in *acceptilatio* was—*liberatio* or the object of the debt. The fact that where the obligation was *pura* the usual delays for restitution were accorded favours the latter view. For discussion of both questions see Czyhlarz, op. cit., pp. 126–7. In my opinion, wherever a husband kept a thing which he otherwise would have been bound to give up, that thing was the object of the dowry—D. 23, 5, 9, pr. On the other hand where his obligation was to get a thing and hand it over, the object was *liberatio*. The thing owed never came into his hands—D. 23, 3, 58, 1. Similarly where there was a contract subject to a term or condition, i. e. with no immediately enforceable obligation, the object was *liberatio*.

The *pactum de non petendo* may also have been used with substantially the same result as *acceptilatio*. This would not extinguish a debt, but would give the husband an *exceptio pacti* good so long as the marriage continued. There is no example in the texts; the case so interpreted by Bechmann[1] being rather an informal agreement assigning to the husband as dowry an object which he owes. This agreement does indeed operate like a *pactum de non petendo*, the woman who brings action during the marriage being met by an *exceptio pacti*. Moreover, if it be true that wherever the husband is permitted to keep a thing which he would otherwise have to deliver, that thing and not the mere *liberatio* is the object of the dowry,[2] the effect is the same. The sole difference lies, then, in the terms used, those of the agreement in question constituting a sort of *dotis dictio* civilly invalid for lack of form but made effective by the praetorian *exceptio*. *Pactum.*

There is good textual authority for classifying the assignment of choses in action as *dotis datio*. The transaction is described generally in the opening phrase of C. 4, 10, 2 as 'Nominibus in dotem datis'. It essentially consists in making over to the husband a right of action against a third person, but the transfer may take place in any one of several ways. The debtor *Delegatio*[3] Assignment.

This is the distinction in D. 23, 3, 43, 2 and D. 23, 5, 14, 2. The sole importance of the distinction is that accessions must be restored where the object of *dos* was a corporeal thing, but not where it was a mere *liberatio*—D. 23, 3, 58, 1.

[1] *Römisches Dotalrecht* 2, 122, cited by Rossbach, op. cit., p. 132, n. 23, and referring to D. 23, 3, 12, 2. I take Rossbach's view, with the essential difference expressed in the previous note.

[2] See above, p. 158, n. 1.

[3] *Delegatio* is used here in the wide sense attached to it for example by Girard, *Manuel*, p. 713.

may be asked and consent to promise payment to the husband in answer to the latter's stipulation—a formal *delegatio*[1]—the husband may be given an express mandate to bring the action with the creditor's name in the *intentio* but with his own in the *condemnatio* of the formula—*mandata actio*; or the *cautio* recording the original debt may simply be handed over alone or with other objects of dowry—an implied mandate.[2] In the classical law, the transfer effected by mandate is not complete and the right does not pass to the assignee until the moment of *litis contestatio*. It therefore falls to the ground unless the mandatory proceeds to *litis contestatio* before anything happens to terminate the mandate. That is the meaning of the *litis contestatio* in the rescript of Valerianus and Gallienus, C. 4, 10, 2, which at the same time makes it clear that even where *litis contestatio* has not been achieved during the validity of the express or implied mandate the later law accords a *utilis actio*. This amounts to saying that after A.D. 260, if not already at the time of Paul,[3] any arrangement expressing the intention of making over a claim as dowry gave a direct right, enforceable by *utilis actio*, to the cessionary.[4] But whereas in the *delegatio* carried out by promise of the debtor the latter could not use against the husband *exceptiones* available against his original creditor,[5] he must have been allowed to use them against a mere procurator *in rem suam*, for the mandate

[1] Not of course a *promissio dotis*. The dowry is constituted at once and consists of the credit or right of action, the constituent being the *delegans* not the promissor in the stipulation.

[2] D. 24, 3, 49, pr.

[3] D. 24, 3, 49, pr.

[4] An exception must apparently be made in regard to a claim based on *fideicommissum*, delegation of which is declared void in D. 23, 3, 59, 1.

[5] D. 12, 4, 9, 1. 23, 3, 78, 5. 44, 4, 4, 20–1.

entitled the husband to exercise only such right as belonged to the mandator.

Waiver of legacy or succession.

The husband is a testamentary successor bound to pay a legacy to his wife. She may waive the legacy, thus converting it into dowry. Where the legacy is *per damnationem* this is only a particular case of release from debt, but where it is *per vindicationem* the waiver makes the husband proprietor of the object, which in either case is affected with the dotal character.[1] Again, the wife is instituted heir and her husband is *substitutus*. She can constitute the inheritance a dowry by refusing it and thus allowing her husband to succeed.[2] Presumably she would have the same power if the husband, instead of being *substitutus*, were heir *ab intestato*. The transformation of legacy or inheritance into dowry depends of course on the man's consent; the waiver would always follow an agreement between the parties. One difference must however have existed between the cases. The waiver of a legacy made or left the husband owner of the object, but a succession would become his only by a subsequent acceptance. This acceptance he would be bound by the dotal agreement to make; neglect or refusal would render him liable to compensation to be exacted by means of an *actio rei uxoriae*.[3]

The *substitutus* or *heres ab intestato* who gets the inheritance in consequence of waiver *dotis causa* becomes heir and is consequently liable *jure civili* to any actions against the estate. On the other hand, when

[1] In Justinian's system, any form of legacy appears to make the legatee owner when the inheritance is accepted, and the difference noted disappears. See above, p. 157.

[2] Repudiation of legacy and inheritance are both dealt with in D. 23, 5, 14, 3.

[3] Arg. D. 23, 3, 33; 56, pr.

the woman herself accepts an inheritance and then makes it over by *in jure cessio* as dowry, the recipient is not heir, the woman retains her character as heiress and is subject to the civil law actions; though, by the cession, debts due to the estate are extinguished,[1] so that neither she nor her husband can proceed on them. The cessionary is under no obligation to the creditors, but, because he has the objects making up the inheritance, may be sued by *utilis petitio hereditatis* by any one disputing the woman's title to succeed.[2] The extraordinary feature of this *in jure cessio* is the extinction of debts due to the estate, which did not occur in *emptio venditio hereditatis*. The latter transaction was usually accompanied by stipulations in which the purchaser undertook to indemnify the vendor for any actions successfully brought by hereditary creditors and the vendor undertook to allow the purchaser to use his actions against the debtors.[3] It is safe to say that the conveyance of an inheritance *in dotem* would not usually take the form of an *in jure hereditatis cessio* but of an actual delivery, *mancipatio*, or *in jure cessio* of the specific objects or rights inherited, the woman thus retaining her actions, which would be brought by her husband as mandatory *in rem suam*. If the parties were properly advised, stipulations like those *emptae et venditae hereditatis* would be entered into. The woman especially would need the assurance of reimbursement for anything she might subsequently be compelled to pay to creditors of the estate. We are told that when she promised all her property as dowry, the promise was legally interpreted as extending only to the surplus over

[1] G. 2, 34–6. 3, 85–8. Ulpian, *Reg.* 19, 12–15. C. 7, 75, 1.
[2] D. 5, 3, 13, 10.
[3] G. 2, 252. D. 18, 4, 2, 8.

debts. But if she was imprudent enough actually to make over everything before her debts were settled, and without a stipulation of indemnity, her only recourse was apparently by *in integrum restitutio*, which was not limited in dotal matters to persons under twenty-five.[1] As for her creditors, they had no action against the husband,[2] unless the whole transaction was to his knowledge in fraud of the constituent's creditors. The *dos in fraudem creditorum constituta*, like any other act with this motive, was revocable on their application.[3]

(*b*) *Dotis dictio* is a verbal contract differing from the *stipulatio*, according to Gaius, 3, 95a, and 96, in being concluded not by a dialogue but *uno loquente*. That the recipient's consent was necessary goes without saying; but the passage of Gaius just cited and the formula several times repeated in the Digest,[4] disguised by the compilers under the description of *promissio*, go to show that the expression of that consent at the moment of *dictio* was not a necessary part of the form, though Terence, *Andria*, 5, 4, 47, represents the *sponsus* as responding by an '*accipio*'.[5] The essential form, then, was probably a mere unilateral declaration that such and such should be dowry. The future tense is usually employed, and Czyhlarz [6] infers from this fact, and from the instances occurring in the comedians,[7] that it must

[1] D. 23, 3, 72, pr. 23, 3, 6, 2. 4, 4, 9, 1. C. 2, 33. [2] D. 23, 3, 72, pr.

[3] D. 42, 8, 10, 14; 25, 1. To succeed against the husband by the *actio Pauliana*, the creditors must show knowledge, but where the constituent was a third party they could recover from the innocent wife —'quasi ex donatione' . . .

[4] D. 23, 3, 25; 44, 1; 46, 1; 57. 50, 16, 125.

[5] Chremes—'Dos, Pamphile, est decem talenta'. Pamphilus—'Accipio'.

[6] Op. cit., pp. 116–20.

[7] Plautus, *Aulul.* 2, 2, 61, and 2, 2. *Trinummus*, 5, 2, 33–6. Terence, *Andria*, loc. cit.

originally always have preceded marriage. He goes further and makes it simply one of the terms of the old actionable *sponsalia*, which separated and became a distinct contract when *sponsalia* ceased to be actionable. In the nature of things, it normally formed part of the negotiations preceding a match between well-to-do families. That it had no separate existence until the action on betrothal was abandoned is a gratuitous conjecture. It may always have been possible, as it was in the classical period,[1] even after marriage, the future tense signifying nothing more than that the specified thing is to be handed over to or remained with the man as dowry.[2]

Only the woman herself, her paternal ascendant or her debtor, could use this form. Any other person desiring to settle a marriage portion on the new household must proceed by *datio* or *promissio*.[3] Dowry normally comes from the woman or one of her paternal ascendants, and the customary rule which made the declaration binding might naturally crystallize itself around these figures. The extension to the woman's debtor would be easy, for in this case also the wife was in substance the constituent, the *dictio* discharging *pro tanto* the original obligation.[4]

The object of the *dictio* might be movable or immovable, corporeal or incorporeal.[5] The effect was not an immediate transfer of ownership, *dictio* not being a

[1] Gaius, *Epit.* 2, 9, 3. Marcellus in D. 23, 3, 44, 1.

[2] The future was not essential, if any authority is to be attributed to Terence, *Andria*, loc. cit., where the verb is 'est', though the arrangement is being made at betrothal.

[3] G. 3, 95a–96 and *Epit.* 2, 9, 3. Ulpian, *Reg.* 6, 2.

[4] D. 46, 2, 31, 1. Cf. Czyhlarz, *Dotalrecht*, p. 114.

[5] D. 23, 3, 25; 44. 1; 46, 1. 50, 16, 125.

conveyance, but usually the setting up of an obligation sanctioned by an *actio stricti juris*.[1] Where something due from the man's side was thus declared dowry—'quod mihi debes doti tibi erit'—the immediate result was the *ipso jure* extinction, not the creation, of an obligation.[2] The dowry here consisted, not of a mere *liberatio*, but of the thing owed, unless the obligation was to hand over something belonging to a third party, in which case the release was the dowry.[3] With this exception the declaration—'quod mihi debes doti tibi erit'—produced the same effect as if the woman had collected her debt and then handed the proceeds back to her husband.[4] Consequently, where Titius had promised his slave Pamphila to Seia, and Seia released him from this debt by *dotis dictio*, Pamphila was the dowry and her offspring was subject, along with her, to eventual restitution, whereas if Pamphila belonged to Lucius restitution would take the form of cancellation of the *liberatio*, and Pamphila alone, object of the original obligation, would be due.

The case of pre-existing debt must have been somewhat exceptional: normally the object of *dictio* would be either land or valuable movable. The obligation to deliver, which was always dependent on marriage, might be made subject to special terms.[5] If not, then the usual

[1] C. 5, 12, 1, pr., where, as Czyhlarz observes, *pollicitatio* is an obvious interpolation for *dictio*.

[2] D. 23, 3, 44, 1; 77. The sole difficulty is that D. 23, 3, 44, 1, seems to represent release by *dotis dictio* as operating *exceptionis ope*. Czyhlarz, op. cit., p. 130, ingeniously suggests that Marcellus refers here only to the time before marriage, since the *dictio* could produce its effect only on marriage. The words *cum filio*, instead of *cum marito*, lend some support, but the passage is doubtful.

[3] D. 23, 3, 58, 1. [4] D. 23, 3, 77. [5] D. 50, 16, 125.

terms for execution of dotal undertakings held good—the immovable could be claimed immediately after marriage, the non-fungible movable after a year, and fungibles in three annual instalments.[1]

Dotis dictio finds no place in the compilations of Justinian. It had passed out of use, probably in consequence of the constitution of Theodosius and Valentinian, A.D. 428,[2] which made valid any undertaking to give dowry irrespective of whether or not there had been a *dictio* or *stipulatio*. From that time on *dictio* loses its identity in the general description 'promissio' or 'pollicitatio', which in the *Corpus Juris* signifies any contract to provide dowry as distinct from its actual delivery.

(*c*) *Dotis promissio*. This is the general type of undertaking—open to the bride, her parents, or anyone else—whereby one contracts to pay or deliver money or other commodity or object, movable or immovable, or to confer some other material advantage, as dowry. To be actionable it must satisfy the conditions demanded from time to time for the validity of promises in general,[3] until the above-mentioned enactment of Theodosius and Valentinian set it apart as a *pactum legitimum*. In form it would usually be a *stipulatio*, though *nexum* and *nomina transcripticia* may also have served in their day. The effect is an obligation enforceable by *condictio* or *actio ex stipulatu*, according to the object of the promise.[4] This obligation, when assumed before the marriage, is always conditional upon

[1] See Czyhlarz, op. cit., pp. 116 and 99, with the citations in n. 6 on the latter page from Polybius, 32, 13; and Cicero's letters to Atticus, 11, 2, 2; 4, 2; 23, 3; 25, 3.

[2] C.Th. 3, 13, 4. C. 5, 11, 6. It is significant that *dictio* is not specified in the enactment as reproduced in Justinian's Code.

[3] G. 3, 95a.

[4] D. 23, 3, 41, 1. Inst. 3, 15, pr.

its taking place, but may be subject to other conditions as well.[1] Special terms for execution may be agreed on, but in the absence of such agreements the object of the promise can only be exacted in three instalments at one year intervals if it is a fungible, or after one year if a non-fungible movable. The immovable alone can be claimed at once.[2] These legal terms were all abolished by Justinian, who enacted (C. 5, 12, 31, 8) that in the absence of agreement to the contrary fulfilment of the promise might be demanded immediately after celebration of the marriage. Before Justinian no interest is due on unpaid dowry unless it has been expressly stipulated; and then the husband can claim it only if he is supporting the household, for, like the *dos* itself, the interest is designed for that purpose.[3] A constitution of A.D. 530 (C. 5, 12, 31) imposes a legal interest of 4 per cent., which begins to accrue after two years' delay in payment. In the same year Justinian gives the husband a tacit hypothec on the property of the promissor to secure the performance of his promise.[4]

The right *in personam* arising out of the *dictio* or *promissio* and vesting in the husband from the date of the marriage or of the contract, whichever is the later, is itself dowry. The older opinion—'dos non verbis, sed re constituitur'—is untenable in the face of D. 23, 3, 36. Whether or not we accept Mommsen's emendation to the accusative 'dotem jam constitutam', the effect is the same. By giving a fictitious receipt for the promised money, the husband loses an already constituted dowry.[5]

[1] D. 23, 3, 76. 45, 1, 108.
[2] Above, p. 166.
[3] D. 24, 1, 21, 1. 24, 3, 42, 2. C. 5, 11, 2.
[4] C. 5, 13, 1, 1–1d.
[5] See also D. 23, 3, 49, cited by Karlowa *Röm. Rg.* 2, p. 207, and D. 23, 3, 33. Neither of these texts is so clear and decisive as D. 23, 3, 36.

The question is of some importance not only for purposes of classification—for we cannot regard *delegatio* as a *dotis datio* if the debtor's promise does not itself set up a *dos*—but also in regard to the husband's obligation. Where the promissor is an *extraneus*, the husband owes the same care as in the administration of any other kind of dowry—to wit, *diligentia quam in suis*.[1] If he negligently fails to exact payment or of intent releases the extraneous debtor, he will be liable for the amount when the dowry falls to be restored. But where the person making the promise is the wife or her father, the husband's indulgence cannot equitably be held against him.[2]

The wife sued on a promise of dowry has the *beneficium competentiae*. So has the father-in-law, provided the suit is brought while the marriage stands. After dissolution, the *beneficium* is accorded him only if considerations of equity demand it. The extraneous promissor has no such privilege, even where he is a donor.[3]

Conditions of validity.

Where it is the woman herself who constitutes dowry, whether by *datio*, *dictio*, or *promissio*, she must usually have the *auctoritas* of her tutor or the *consensus* of her curator.[4] Until the abolition of perpetual guardianship, she might have both tutor and curator, in which case

[1] D. 23, 3, 17, pr. 24, 3, 24, 5. 13, 6, 18, pr. *in fine*. D. 23, 3, 33; 49.

[2] D. 23, 3, 33.

[3] D. 23, 3, 84. 24, 3, 17, pr.—1. 42, 1, 21–2. For the extraneous donor, see D. 42, 1, 41, pr., which proves the accuracy of Czyhlarz's interpretation (op. cit., p. 112) of D. 23, 3, 33. The extraneous donor has the *beneficium* against the wife, who is donee, and she cannot complain if her husband does not press him for payment. Czyhlarz supplies the subject 'mulier' for 'convenisset'.

[4] Ulpian, *Reg.* 11, 20. G. 1, 178. Cicero, *pro Flacco*, 35—'quaecumque sine hoc auctore est dicta dos, nulla est.' D. 26, 7, 52.

auctoritas and *consensus* would both be required.[1] It is clear from D. 23, 3, 60, and C. 5, 37, 9, that a curator administering the estate of a woman under twenty-five normally determined the amount of *dos* in accordance with her station and resources and subject to magisterial revision. Where the amount promised was in excess of the capacity of the estate to pay, the undertaking was void as to such excess.[2] The functions of tutor and curator respectively in the constitution of dowry are almost inextricably confused in the *Corpus Juris* by the substitution of 'curator' for 'tutor' in consequence of the disappearance of perpetual guardianship.[3] In the absence of any plain indication to the contrary it seems safe to assume that the same difference in powers obtained here as in other matters involving minors. That is to say, that so long as women more than twelve years of age had tutors, these latter acted *dicis gratia* only, unless they had the material interest of patron or parent;[4] whereas a curator, whether permanent or *ad hoc*, had the substantive duty of administration and consequently a measure of discretion.[5] Finally, *auctoritas* would not always be necessary even *dicis gratia*. Thus, where the *dos* was constituted by the datio of *res nec mancipi*, the *sponsa* or *uxor* over twelve could act alone,[6] though for *dictio*, *promissio* or release by *acceptilatio* or *pactum* her tutor must be called in.[7]

[1] This is not contradicted by F. V. 110. Paul may mean either or both of two things:—(*a*) that there need not be a curator; or, (*b*), that where there is a curator, he need not be present to give *consensus*, whereas the *auctoritas* is valid only if given 'in ipso negotio'. *Inst.* 1, 21, 2. D. 26, 8, 9, 5.

[2] D. 23, 3, 61. [3] See, for example, D. 23, 3, 61. 26, 7, 43, 1.

[4] G. 190–2. Ulpian, *Reg.* 11, 27. [5] Cf. Solazzi, *Minore Età*, pp. 133–5.

[6] G. 2, 80; 85. [7] G. 1, 192. 3, 171. Ulpian, *Reg.* 11, 27.

The texts which assign to the curator the duty of determining the amount of dowry indicate that the limitations on his and the tutor's powers successively enacted by Severus and Constantine[1] did not apply to the conveyance of property to the husband for dotal purposes. They did apply, however, to the sale of property with the object of establishing a dowry in money. The curator must apply to the magistrate who appointed him for permission to raise the money by sale, and this would only be granted where the man had made it a condition of marriage.[2]

Dowry is always given in consideration of marriage or promise of marriage. The thing transferred to or left with the man or the right conferred upon him never acquires the dotal character until the state of matrimony has come into existence. The right *in personam* indeed is always treated in the texts as subject to the suspensive condition of marriage, as non-existent—that is to say, until this condition, which is understood where it is not specified, is realized.[3] The right *in rem*, on the other hand, vests in the man at once, unless there is clear evidence of contrary intention. Thus the man normally becomes owner at once of the thing made over to him, though it must await the marriage to attain the dotal character.[4] If the engagement is broken off, the constituent will accordingly recover by a *condictio causa*

[1] D. 27, 9, 1. C. 5, 37, 22.

[2] D. 23, 3, 61, 1.

[3] D. 2, 14, 4, 2. 23, 3, 21–3; 41, 1; 68.

[4] D. 23, 3, 8; 41, 9, 1, 2—'si tamen non evidenter id actum fuerit, credendum esse id agi Julianus ait, ut statim res ejus fiant . . . ante nuptias autem non pro dote usucapit, sed pro suo'. This opinion of Julian is cited with approval by Paul in F. V. 111. The *aestimatio* in the latter passage has merely the effect of postponing until the marriage the moment at which the man can begin to regard the thing as his.

data causa non secuta, unless the intention was that the property should vest in the man as from the date of marriage only, in which case the remedy is *vindicatio*.[1] In either case, fruits and accessions must also be restored.[2] No action for recovery can be brought with success until after the *nuntius* has been sent breaking off the match, for until this is done the recipient is protected by an *exceptio doli* or *in factum*:[3] but the fact that the woman is responsible for the breach has no effect on the obligation to restore even the fruits.[4] Paul says in D. 22, 1, 38, 1 that this obligation is imposed by the law to secure proper care of the object by *sponsus*, an explanation which implies a duty to compensate for fruits which he has failed, by reason of his neglect, to obtain.[5] He is responsible for *culpa* as well as for *dolus*, the diligence required of him being that which he displays in his own affairs.[6] Accessions, whether before or after marriage, add themselves to the dowry and must be restored with it when it falls to be restored. Fruits are subject to a different regime—those produced before marriage increase the dowry, like accessions, unless a special agreement makes them a

[1] D. 12, 4, 6; 9, pr. 23, 3, 7, 3; 8; 9, pr. [2] D. 12, 4, 7, 1. 22, 1, 38, 1.
[3] D. 23, 3, 7, 3. [4] D. 22, 1, 38, 1.
[5] Czyhlarz, *Dotalrecht*, p. 143, holds that liability for neglected fruits begins only with *mora*, and cites Mommsen, *Beiträge* III, p. 232, in support.
[6] D. 23, 3, 17, pr. Lusignani, *Responsibilità* 2, 98, regards the standard of care *quam in suis* specified in the last phrase of this passage as an interpolation. Cf. Mitteis, *Privatrecht*, pp. 331–2, n. 53. In Z.S.St. 45, 1925, pp. 266–351, W. Kunkel argues that both *diligentia quam in suis* and *diligentia boni patrisfamilias* are post-classical standards. As to this see, however, Buckland, *Diligens Paterfamilias* (reprint from *Studi in Onore di P. Bonfante*, Pavia, 1929) p. 19 and *passim*. The rule stated in the text is at any rate true for the law of Justinian.

gift to *sponsus*, whereas those produced after marriage ordinarily accrue in full property to the husband for the support of the household.[1]

Eviction. The consequences of an eviction vary with the mode of constitution. The husband ousted from corporeal things in *dotem datae* has no action, failing specific provision, unless the constituent fraudulently delivered them with the knowledge that they belonged to another. But where eviction follows *promissio* or *dictio*, the recipient has an action on the contract, which is not discharged by the delivery, even innocent, of *res alienae*. Where the dowry consists of assigned debt, the assignor guarantees the existence of the debt, but not the solvency of the debtor.[2]

Aestimatio and *Permutatio.* When dowry consists of immovables or non-fungible movables the husband's duty is to administer it with at least as much care[3] as he devotes to interests exclusively his own and, in certain circumstances, to restore it with accessions. For any loss, destruction or deterioration not due to his fault he is not responsible. On the other hand, fungibles are at the husband's risk, and are restorable irrespective of events over which he had no control.[4] In the latter case, therefore, difficult questions of *culpa*, of *force majeure*, even of identification of specific things which may arise in the former,

[1] D. 23, 3, 7, pr.; 10, 2–3. See also D. 7, 1, 68. Inst. 2, 1, 37. The fruits produced after marriage may themselves be added to dowry by special agreement, e.g. the revenue of a large estate. Such revenue must be restored as dowry, but interest on the accumulating revenue belongs to the husband. The fruits of usufruct may also be made subject to restitution if the wife at the same time agrees to support herself. D. 23, 4, 4.

[2] D. 46, 3, 98, pr. C. 5, 12, 1, 1–2. For eviction from *dos aestimata*, see below, p. 230–1.

[3] See post, p. 179.

[4] D. 23, 3, 42.

are avoided. To eliminate the uncertainties in the obligations attaching to immovables and non-fungibles the device of *aestimatio* was invented. This was an agreement setting a fixed value on the thing handed over. Its effect was to free the property in the husband's hands from those limitations arising, in the absence of *aestimatio*, out of its character as dowry. The house, *fundus*, or furniture, was not *in dote*. What formed the dowry here and was subject to restitution was the specific sum agreed upon as the value. The husband might do what he liked with the *fundus*, just as he might with *res quae pondere numero mensura constant*. Its accessions as well as its fruits were his in absolute property.[1]

Ulpian describes this *aestimatio* as *vera venditio*.[2] From the moment of *aestimatio*, or marriage, whichever is the later, though delivery has not yet been made, the risks are borne by the husband, just as in sale.[3] If he is evicted he has an *actio empti*, and the product of the action is dotal.[4] His usucapion is *pro emptore*.[5] Yet the transaction differs essentially from ordinary sale, especially in this respect that the price can be exacted only in circumstances calling for the restoration of dowry by an action *de dote*, not *ex vendito*, and will then be subject to reduction by the *retentiones*.[6] Moreover, the *aestimatio* must set a just value on the thing.

[1] F. V. 111. D. 23, 3, 10; 12; 14; 15; 16; 18; 69, 8. 24, 1, 53, 1. 24, 3, 49, 1; 51; 66, 3. C. 5, 12, 5; 10.

[2] D. 23, 3, 10, 4. Czyhlarz, op. cit., p. 153 et seq., prefers to regard it as a *pactum* attached to a *dotis datio* and resulting in some of the incidents of sale. Karlowa, op. cit. 2, 209, accepts Ulpian's description. The difference is of little consequence.

[3] D. 23, 3, 10, 5. Of course if she is *in mora* for non-delivery, the risk is the wife's: D. 23, 3, 14.

[4] D. 23, 3, 16. [5] D. 41, 9, 2. [6] D. 23, 3, 16. F. V. 105.

If the woman has been deceived in this regard, the husband, when it comes to restitution, must pay a just price or return the object,[1] whereas in ordinary sale the rescission for unfair price is of late development and available only for *laesio enormis*.[2]

When *aestimatio* takes place before marriage it is treated as a sale subject to a suspensive condition. Ownership does not pass to *sponsus* though delivery is made, nor does he begin to acquire by usucapion until the marriage has been celebrated. Risk and accessions are for *sponsa*, and if *nuntius* is sent she recovers by *vindicatio*.[3]

The ordinary results of *aestimatio* may be modified by an additional clause to the effect that instead of the money representing the agreed value of the object another object of the same kind and of the agreed value shall be restorable. As Czyhlarz points out,[4] this agreement puts the non-fungible in the same general position as the fungible. He is on more doubtful ground when he excludes here the peculiar attributes of sale, such as usucapion *pro emptore*. There is no authority for this statement. At any rate, the risks and advantages are for the husband, as in sale, but also—it

[1] D. 23, 3, 12, 1. Cf. D. 23, 3, 6, 2.

[2] C. 4, 44, 2; 8. Gradenwitz—*Bull.* 2, 1889, p. 14, holds *laesio* to be later than Diocletian.

[3] D. 23, 3, 10, 4–5; 17, 1. 41, 9, 2. F.V. 111. But see Beseler in Z.S. St. 45, 1925, pp. 257–9, for the view that all the texts which describe *aestimatio* as a sale conditional upon the celebration of marriage are interpolated. His emendations make it originally an immediate sale in which the *sponsus* bears the risks and begins usucapion even before the marriage. In case of eviction he has an action against the woman *ex empto*, and the product does not become dotal, but is retained by the man on dissolution of the marriage.

[4] Op. cit. pp. 161–2.

must be confessed—as in the case of dowry consisting of unestimated fungibles.[1]

Aestimatio may be accompanied by an agreement that either the agreed sum or the object itself shall be subject to restitution at the option either of the man or of the woman. This arrangement is one step further removed from sale and no advantage is gained by classifying it as such. It differs, however, from the ordinary *datio* of non-fungibles in assigning to the husband any accessions and the risk of a complete destruction putting an end to the option. The incidence of the risk of deterioration depends on who has the option.[2] Where the wife may choose the husband may not sell the *fundus aestimatus*.[3]

Dowry may be estimated purely *taxationis causa*, with the object, in other words, of fixing in advance what the husband will have to pay if the specific object cannot be restored. Clearly there is no sale there. The *dos* consists of the object, not the *aestimatio*, and risks and accessions fall to the wife. The husband takes the object *cum causa sua* and has no action for eviction, though, if the woman has knowingly given something to which she had no title, she is liable to an *actio doli* or *in factum*.[4] The obligation here is to restore the specific thing; and it is not satisfied by payment of the *aestimatio* so long as that thing is extant though sold to another, unless the sale has been consented to by the woman.[5]

[1] D. 23, 3, 18. 23, 4, 32, pr. 24, 3, 66, 3.
[2] F. V. 114. D. 23, 3, 10, 6; 11.
[3] D. 23, 5, 11. C. 5, 23, 1.
[4] Papinian in D. 23, 3, 69, 7 says *actio doli*; Severus in C. 5, 12, 1, 2 says *actio in factum* to avoid an *actio famosa* between husband and wife.
[5] D. 23, 3, 69, 7. 24, 3, 50. C. 5, 12, 21.

When *aestimatio* in its fullest form occurs after marriage and after the property constituting dowry has been delivered, what takes place is in effect a *permutatio dotis*. The *aestimatio* succeeds the corporeal thing as dotal object,[1] with the consequence that subsequent risks and accessions fall to the husband.

Permutatio dotis may be effected by direct agreement for that purpose. The consorts may agree that instead of the money originally given land or furniture shall be the dowry. If money is substituted for land or furniture the arrangement would seem to be identical with *aestimatio*, unless indeed the requirement of a fair equivalent from the man's point of view disappears here. It is doubtful, however, if the sole condition which the texts attach to *permutatio*, namely, that the woman shall not lose by it, is to be interpreted *ex contrario* as excluding any claim on the part of the husband to have the arrangement set aside on account of unfair advantage.[2] One plot of land may be substituted for another.[3] Where things belonging to dowry are sold with the wife's consent the price is dotal, unless the consorts have agreed that the alienated property shall be replaced by something other than its price.[4]

It is not within the husband's power acting alone to shift the dotal character from one thing to another. Those texts therefore which state that objects obtained by him in exchange for money or other property forming the dowry 'dotales esse videntur' or 'quasi dotales sunt',[5]

[1] D. 23, 3, 12, 1—Where the *aestimatio* is void as made *donationis causa*, *res in dote remanebit.*

[2] D. 23, 3, 25–7. 23, 4, 21. Cf. Czyhlarz op. cit., p. 291.

[3] Arg. D. 23, 4, 32 and D. 23, 3, 50.

[4] D. 24, 3, 50.

[5] D. 23, 3, 54. 24, 3, 22, 13.

do not imply a *permutatio*, and must be interpreted as meaning only that such objects are assimilated to dowry for certain purposes. As Czyhlarz observes,[1] the purpose referred to in the passages in question is the application of the wife's privilege as against other creditors.

Circumstances other than specific agreement are often responsible for a more or less automatic *permutatio*. Thus where the dotal object is lost or destroyed without fault on the man's side, any actions which he may have, such as *furti* or *de damno injuria dato*, and eventually the product of such actions, become dotal, as do the damages recovered in any action arising out of an eviction.[2] When a *dictio* or *promissio dotis* is fulfilled, any property so placed in the husband's hands takes the place of the right *in personam* as dotal object.[3] Where the dowry consists of an undivided share, adjudication in an *actio communi dividundo* or *familiae erciscundae* may substitute a sum of money or other property.[4] Finally, the *liberatio* from an obligation to convey a thing not owned by the husband gives way to the thing itself if he acquires it.[5]

4. Ownership and Administration.

Dowry is owned and administered by the husband, or his *paterfamilias* if he has one. That is the early and classical law; in the late Empire *paterfamilias* does not become owner unless the property is conveyed to him directly, that made over to his *filius* being part of the latter's *bona adventicia* in which the father has only a usufruct coupled with the power to administer.[6] The rights of *paterfamilias* in dowry conveyed to his son

[1] Op. cit., pp. 294 and 406–11. And see below, pp. 190–1.

[2] *Actiones furti* and *de damno injuria dato*, D. 24, 3, 18, 1. Eviction, D. 23, 3, 16.

[3] See above, p. 167.

[4] D. 23, 3, 78, 4.

[5] D. 23, 5, 14, 2, and see above, p. 158, n. 1.

[6] C. 6, 61, 1–4.

result entirely from *patria potestas*: they are justified partially, not entirely, by the incidence of the *onera matrimonii*. So long as the *filiusfamilias* owned no property the *onera* fell upon paterfamilias,[1] but with the recognition of *peculium castrense* and *quasi-castrense* and *bona adventicia* this must have become less and less true in fact. Moreover, there were cases of legal separation of *dos* from the *onera*. Thus, where a married son was emancipated or given in adoption, the burden of support passed to the son or the adoptive parent, though the dowry remained with the natural father.[2]

Though the ideal connexion of *dos* with the duty of support was not a universally valid principle, it did serve to qualify some of the harsher logical consequences of the law which—invariably in the earlier period, and where the conveyance was directly to him under Justinian—vested dowry in the husband's *paterfamilias*. When the *paterfamilias* died leaving his married son as one of several joint heirs, the married son took the whole dowry, which was abstracted from the estate before division.[3] This *praeceptio* could be claimed even where the institution was subject to a pending condition.[4] What of the event of disinherison? Originally the husband had no claim, unless indeed there was a legacy of the *dos* to him. But later doctrine

[1] D. 10, 2, 20, 2; 46. 49, 17, 16, pr. But there was no *legal* duty of support until the Empire, perhaps not before the second century A.D.—Girard, *Manuel*, p. 648. Pernice, Z. S. St. 1884, pp. 22–4.

[2] D. 1, 7, 45. Czyhlarz, op. cit., p. 28. Contra Savigny, *System*, 2, 115, n. x., who takes *au pied de la lettre* Paul's statement in D. 23, 3, 56, 1—*Ibi dos esse debet, ubi onera matrimonii sunt*—where the alleged rule appears to be cited as justification of the *praeceptio* of *dos* by the husband on his father's death.

[3] D. 10, 2, 51, pr. 33, 4, 1, 13; 7, 3.

[4] D. 10, 2, 46.

gave a *utilis actio*, which annulled the effect of disinherison as far as dowry was concerned.[1]

The husband's or *pater*'s ownership was so far limited even at common law by the incidents attaching to dowry, the *causa dotis*, that even jurists allowed themselves to speak of *patrimonium mulieris*.[2] Further limitations were added by statute, until, under Justinian, there was no more than a theoretical difference from the position in Greek law. The theoretical difference is adequately accounted for as a survival from the early law which, in the marriage with *manus*, once gave an absolute property, exempt from any obligation to account, to the husband's side of the household. This was gradually whittled down by the increase in the number of eventualities calling for restoration to the wife's side or, finally, to children of the union, and by prohibition of alienation or hypothecation, until all that substantially remained with the husband was the right and duty to administer. The maxim *dotis causa perpetua est*,[3] literally true to begin with, was less and less in harmony with practice, and ultimately became false.[4]

The recipient of dowry was accountable, in the increasingly numerous cases of compulsory restitution on dissolution of the marriage, for an administration no less careful than that of his non-dotal property.[5]

[1] D. 33, 4, 1, 9.

[2] See, for example, D. 4, 4, 3, 5. 23, 3, 75. C. 5, 12, 30, pr.

[3] D. 23, 3, 1. That 'dowry is a permanent acquisition' was true in Paul's day only in the sense that no fixed term was attached to the recipient's ownership. Apart from specific agreement, the conditions making it restorable must have been well known, and we may well doubt the accuracy of the statement that it was made over with the intention that it should always remain with the husband.

[4] See below, pp. 200–2.

[5] D. 23, 3, 17, pr. See above, p. 171.

Yet there was nothing, until the Augustan legislation, to prevent him from alienating the dotal object. True, if the union was dissolved under circumstances giving the woman or other constituent a right to restitution, it was the duty of the recipient to restore the specific thing, unless it had been alienated with the consent of the party entitled to restitution. A complete fulfilment of this duty accordingly involved re-acquisition. But as the condemnation in the formulary period was necessarily in terms of money, all that the woman or other constituent could count on recovering was the pecuniary equivalent of her or his interest, which might be greater or less than the price obtained or the market value at the time of alienation. This was the position until the *lex Julia de Adulteriis*, in a section often described by modern commentators as *lex Julia de Fundo Dotali*,[1] prohibited on pain of nullity the alienation of rustic or urban *praedia* in Italy without the wife's consent. Any pledging of such lands was void even when the wife consented.[2] The *lex Julia* applied only when the woman herself eventually became entitled to recover the specific land; not, therefore, when there had been an *aestimatio* with full effect, or a *permutatio*, or where the husband had the option to restore something else in its place.[3] The jurists interpreted the statute as prohibiting also the remission or imposition of servitudes and alienation by a prescription begun after the

[1] The texts usually refer the prohibition simply to a *lex Julia*. But Paul in *Sent.* 2, 21 b, 2 specifies *lex Julia de Adulteriis*.

[2] *Inst.* 2, 8, pr. There is no special mention of pledge in Gaius, 2, 63, Paul, *Sent.* 2, 21 b, 2, in D. 23, 5, or C. 5, 23. Girard, *Manuel*, 971–2 attributes the rule mentioned in the Institutes to a combination of the *lex Julia* and the law prohibiting suretyship by women.

[3] D. 23, 5, 3; 9; 10; 11; 17. C. 5, 23, 1.

land became dotal.[1] Where the law applied, the attempted alienation being void, the property remained where it had been; and the woman entitled to an *actio rei uxoriae* could claim a cession of the *vindicatio*.[2] Justinian, as he tells us in *Inst.* 2, 8, pr., extended it so as to exclude the alienation or pledge of lands whether in Italy or in the provinces. Thereafter, the wife's consent did not give validity to alienation any more than it did to pledge.[3] But only seven years had elapsed when the law was again modified. Novel 61 (A.D. 537) applies to dowry the rules which it establishes for *donatio propter nuptias*, with the result that dotal land may be validly alienated or pledged, provided the wife consents and repeats the consent after two years, and provided her husband continues to have resources adequate to meet her lawful claims to the dowry when those claims are made.[4]

These restrictions, together with the general hypothec finally given to the wife, went far to secure her against the consequences of insolvency on the husband's side. They were dictated by the growing conviction that, while the fruits and revenues of the dowry rightly accrued to the man responsible for the maintenance of the household, the property itself should be preserved as a provision for the woman in the event of a dissolution of the marriage occurring in her lifetime. It was to the interest of the State that she should not be left destitute, but should have the wherewithal to secure

[1] D. 23, 5, 5–6; 16.

[2] Cf. Gide, *Condition privée de la femme*, 2nd. ed., p. 533.

[3] C. 5, 13, 1, 15–15 c (A.D. 530).

[4] Cf. Pierre Noailles, *L'inaliénabilité dotale et la nouvelle* 61, pp. 114 et seq.; and A. J. Boyé in R. H. 1924, pp. 476–7.

another marriage.[1] The same considerations would explain the alleged rule that pacts between consorts which prejudice the woman's interest in her dowry are invalid.[2]

5. Restitution

(a) Dos recepticia and *actio ex stipulatu.*

The constitution of dowry may be accompanied by stipulations settling what is to be done with the property on dissolution of the marriage. The *dos* is then described as *recepticia*[3] and must be dealt with according to the terms of the agreement. The stipulation, referred to in the well-known passage of Aulus Gellius, 4, 3, as 'cautio rei uxoriae' was probably the sole means originally available to secure restoration of dowry. It continued to be used, after the *actio rei uxoriae* had come to be granted in the absence of stipulation, because it founded an obligation actionable by the heirs of the constituent and left the husband without any right to *retentiones propter liberos* or *propter mores*.[4] The action to enforce this contractual obligation to restore was the actio *ex stipulatu*, with which the *actio rei uxoriae* was finally fused by Justinian.[5]

(b) Actio rei uxoriae.

The *actio rei uxoriae* was originally granted, according to the view now prevailing, as a penal proceeding by which the woman divorced without fault on her part could recover, from an unjust husband, such portion of the property brought into the marriage by her as the judge might consider equitably due in the circum-

[1] Paul in D. 23, 3, 2—'Rei publicae interest mulieres dotes salvas habere, propter quas nubere possunt.' Cf. D. 42, 5, 17, 1; 18.

[2] D. 23, 4, 14–17; 27; 29, pr. F. V. 120. See below, pp. 199–200.

[3] Ulpian, *Reg.* 6, 5. D. 39, 6, 31, 2.

[4] C. 5, 18, 5. 5, 13, 4–7, especially 5 f. Of course the special agreement might provide an equivalent for the *retentiones*, which were claimed as of right against the *actio rei uxoriae.*

[5] C. 5, 13, 1. *Inst.* 4, 6, 29.

stances.[1] In the classical law, this action is equally available for the woman who has herself occasioned a divorce or whose marriage has been dissolved by the death of her husband. Its penal character has long been forgotten, dowry having come to be regarded as restorable, at least in part, in all cases of dissolution where the woman survives.

Dos profecticia and *adventicia.*

When the *dos* is *profecticia*, the recipient is not relieved of the duty of restoration even by the death of the woman. The paternal ascendant who dowered her is entitled to recover, *ne et filiae amissae et pecuniae damnum sentiret.*[2] Dowry is *profecticia* when it proceeds from the substance of a father or other paternal ascendant, whether it be constituted by such ascendant directly or by someone else acting on his behalf. In the classical law, at least, it is not necessary that there should be any relation of *potestas*: the *dos* given for an emancipated daughter is *profecticia.*[3] But the constitution must amount to a diminution of the ascendant's estate and must not be in satisfaction of a debt other

[1] Above, p. 150, n. 1. The fact that this remedy was not ordinarily accorded to the woman's heirs also goes to confirm the view that it was designed as compensation for a personal wrong. See below, p. 187, and compare Bonfante, *Corso*, 1, 340–43.

[2] D. 23, 3, 6, pr.

[3] D. 23, 3, 5, 11. In the classical law the father's claim, *mortua in matrimonio filia*, was not conditional upon *potestas*—D. 24, 2, 5. 24, 3, 59. But after Justinian's reforms it seems that the father could not recover *dos profecticia* unless his daughter was *in potestate* at least at the moment when the dowry was constituted. Mitteis, *Reichsrecht*, p. 254; and, for a detailed study of the question, Solazzi, *Restituzione della dote*, pp. 418–32. Bonfante, *Corso*, 1, pp. 304–6 and 351–2 holds that under Justinian *dos* is only *profecticia* when given by *paterfamilias*, and that the donor ascendant can recover *dos* as *profecticia* only if he had *potestas* over the daughter both when the dowry was constituted and when she died. He relies on C. 5, 13, 13 c. 5, 18, 4. 5, 12, 31, 3.

than the dotal obligation. Thus, where a man refuses a succession or legacy with the result that it accrues as dowry to his son-in-law, or where he makes the promise or conveyance on the bidding of a creditor descendant, the *dos* is *adventicia*. The same is true of the dowry constituted by one who has been given something which is to serve as a marriage portion for his descendant, or who has fallen heir, after a descendant's marriage, to the promissor of dowry for her. Only that ascendant from whom the dowry is *profecta* can claim its restoration as *profecticia*; the right does not descend to his heir even though the heir is himself an ascendant of the married woman.[1] All dowry which is not *profecticia* is *adventicia*, and in the classical law, failing stipulation making it *recepticia*, accrues to the husband whose marriage is dissolved by his wife's death.[2]

On dissolution by divorce or by the decease of the husband, the woman *sui juris* may bring the *actio rei uxoriae*. The *filiafamilias*, on the contrary, cannot in general proceed alone or in her own name. The claim for restitution is to be made by her *paterfamilias*, who joins his daughter as co-plaintiff.[3] It is only when *paterfamilias* is absent in exile or captivity or is not of sound mind, that his daughter may take action without him, and then she must give security that he will abide by the result.[4] The joinder of the daughter's name is however not a mere matter of form. She must consent

[1] This was true at the end of the Republic (Labeo quoting Servius Sulpicius in D. 23, 3, 79) and again under Justinian (C. 5, 13, 13 c) but for the time of Celsus see D. 37, 6, 6, and compare Solazzi, *Restituzione*, pp. 410–13.

[2] D. 23, 3, 5. 24, 2, 5. Ulpian, *Reg.* 6, 3 and 5. F. V. 116.

[3] Ulpian, *Reg.* 6, 6. (C. 5, 18, 10 for the case of dissolution by husband's death) F. V. 269.

[4] D. 24, 3, 22, 4 and 10–11.

to the exaction of the dowry from her late husband or his heirs. Restoration without her consent to her father or to anyone else, except where the *dos* is *recepticia*, will not prevent her from taking action on becoming *sui juris*, any more than payment to her or her delegate without the consent of *pater* will deprive the latter of his action.[1] But in virtue of a rescript of Caracalla, cited by Ulpian in D. 24, 3, 2, 2, *filia* is to be taken as consenting unless she expresses her dissent, except that if she be absent her silence is not to be taken as consent, and her father must give security for her ratification. The necessity for the father's co-operation lasts only so long as his *potestas*. Anything which makes the ex-wife *sui juris* after the cause of action has arisen renders her capable of proceeding alone.[2]

The reason suggested in the texts for this joinder of father and daughter is their community of interest in the dowry.[3] These expressions cannot be taken in their technical sense; for until the late imperial legislation on *bona adventicia* the product of the action accrues in full property to *paterfamilias*.[4] The power given to the daughter to prevent exaction of the dowry served to protect her establishment against the greed of a *paterfamilias* who, before the time of the Antonines—possibly, in strict law, until the reign of

[1] D. 24, 3, 2. 31, 34, 5. The 'et dos ab eo profecta est' of D. 24, 3, 2, 1 is not to be taken as limiting the pater's action to *dos profecticia*. No such limitation is suggested by the other texts cited; it is indeed specifically rejected in Ulpian, *Reg.* 6, 6. The phrase is probably an interpolation necessary in the law of Justinian to justify the following 'ipsius', since under that law the father would have nothing more than a usufruct in property coming to his daughter from any source other than his own estate.

[2] D. 24, 3, 42, pr.; 66, 2. 48, 20, 10, 1.

[3] D. 24, 3, 2, 1; 3.

[4] D. 35, 2, 14, pr. C. 6, 61, 1–4.

Diocletian—might dissolve the marriage against her will. One motive for doing so, namely to appropriate the dowry, was removed by this measure of control.[1] The rule found another *raison d'etre* in the expediency of keeping the marriageable woman endowed.[2] She could prevent recovery of her dowry until satisfactorily assured that it would be available for a second marriage. That the same portion did in fact serve for successive matches is shown by the excerpt from Pomponius ad Sabinum in D. 24, 3, 4. In Novel 97, c. 5, Justinian makes the father who recovers the dowry which he had given for a first marriage supply his daughter with an equal establishment for a second.

The only persons other than a widowed or divorced woman who can normally bring an *actio rei uxoriae* are the *paterfamilias* acting with such woman and, after her death, the paternal ascendant who dowered her. The right of action does not devolve upon the heirs of the ascendant[3] or, except where the husband or his successor is in *mora* for non-restitution before her death, upon those of the wife. To place the husband or his successor in *mora*, an interpellation must have been made by or on behalf of the woman: that is to say, there must have been a summons, at a convenient time and place, to restore.[4] Where this has been done and the woman dies, her heirs are allowed to recover because, if there had been no *mora*, the dowry would have become her property and would have devolved upon her heirs in

[1] See F. V. 116. D. 43, 30, 1, 5. C. 5, 17, 5, and the discussion in Chapter V, p. 122 above.

[2] D. 23, 3, 2.

[3] Save as stated above p. 184, n. 1.

[4] D. 22, 1, 32, pr. F. V. 95. Ulpian, *Reg.* 6, 7.

ordinary course.[1] *Litis contestatio* by or on behalf of the woman presumably rendered the claim transmissible.[2]

Lenel's reconstruction of the formula in the *actio rei uxoriae* runs as follows:

> S.p.N^{m}.N^{m}. A^{ae}. A^{ae}. dotem partemve ejus reddere oportere, quod ejus melius aequius erit, ejus judex N^{m}. N^{m}. A^{ae}. A^{ae}. c.s.n.p.a.[3]

This supports the view that the action was at first penal and designed to compensate a divorced wife for the wrong done her by an unfaithful or capricious husband. The formula does not presuppose that dowry is in principle restorable: the question submitted to the judge is not merely how much is to be restored but whether any restoration is due.[4] Cato's speech, in Aulus Gellius 10, 23, shows that in the first half of the second century B.C. the judge had it in his power to dismiss the woman with nothing, though the words used, 'multatur' and 'condemnatur', imply that already she was normally entitled, failing proof of misconduct, to recover the whole. This large judicial discretion has disappeared in the last century of the Republic: in Cicero's time all that the husband may claim is certain *retentiones*,[5] and the passage which reveals this progress also shows that the woman does not forfeit her claim by being the one to take the initiative in divorce. In view of the precision with which the *retentiones propter liberos* and *propter mores* are fixed, it seems certain that

[1] Czyhlarz, op. cit., p. 299.

[2] D. 50, 17, 87; 139. F. V. 112 looks like a specific case of *litis contestatio*, especially in Mommsen's restoration. See Girard, *Textes*, p. 530, n. 1.

[3] *E. P.*, p. 305. The sources are Cic. *Top.* 17, 66; *de Off.* 3, 15, 61. D. 4, 5, 8. 24, 3, 66, 7.

[4] Cf. Czyhlarz, op. cit., pp. 43–4.

[5] *Top.* 4, 20.

they had their origin in statute, though the name and date of the enactment remain unknown.[1]

Praelegatum dotis and *Edictum de Alterutro.*

It was a frequent practice, dating probably from before the establishment of the *actio rei uxoriae*,[2] for husbands to insert in their wills a *praelegatum*, *relegatum* or *legatum dotis*,[3] or a *legatum pro dote*. In these cases the widow was limited to a choice: that is to say, she could not, after the introduction of *actio rei uxoriae* or having an *actio ex stipulatu* for a *dos recepticia*, take the legacy and then sue for her dowry, or *vice versa*.[4] The form of the legacy or institution showed that it was intended as satisfaction of the dotal obligation, and to have allowed a double exaction would have been to defeat the testator's wishes. The exercise of one right can scarcely have extinguished the other *ipso jure*, but, as C. Th. 4, 4, 7, shows,[5] the same practical result was achieved by requiring the claimant to give security against proceedings on the alternative grounds.

When the bequest was a *legatum dotis* the woman received only the amount recoverable if the action for dowry had been instituted. Accordingly, if that action would have been *rei uxoriae* as opposed to *ex stipulatu*, all the *retentiones* not dependent upon divorce were available against her.[6] But the *legatum pro dote* was a bequest, not of the dowry itself, but of some equivalent therefor, and the specific objects could be demanded

[1] Voigt's hypothesis (1866) of a *Lex Moenia de dote* enacted in 186 B.C. is generally discredited. See Gide, op. cit. 527, n. 3; Girard, *Manuel*, p. 970, n. 4; Rotondi, *Leges Publicae Populi Romani* (Milan, 1912), pp. 286–7.

[2] Esmein, *Mélanges*, p. 43.

[3] The terms are used interchangeably.

[4] D. 31, 53, pr.

[5] 'Sic mulier . . . cum suam explanaverit optionem, ne poenitentia possit ad aliud transire etiam satisdatione cogetur praecavere. . .'

[6] D. 33, 4, 1, pr.—7.

without any reduction[1] other than a possible contribution to the Falcidian fourth. The advantages of proceeding under the will are obvious in the second case; in the first they consisted solely in the exclusion of the delays for restitution of fungibles and the inheritability of the action.[2]

It was also possible to institute the wife as heir by way of satisfaction of her dotal claims. If she was sole heir, her option consisted in choosing between refusal of the succession and exaction of the dowry from the substitutes or intestate successors on the one side and acceptance with the consequent automatic extinction of her special dotal rights on the other. If she was one of several joint heirs, the extinction would not be automatic, but she was not permitted to accept her share and then sue her co-heirs for dowry.

In all these cases the refusal to allow a cumulation of claims was a logical consequence of the expressed wishes of the testator. Frequently, however, a legacy was left to a wife without anything to show that it was designed as a reimbursement of dowry. Here then was nothing to prevent cumulation until the introduction, by an unknown praetor, of the *edictum de alterutro*.[3] To this edict have sometimes been attributed the effects which we have just described as flowing from the expressed

[1] D. 33, 4, 2, pr. Solazzi considers it exempt from the Falcidian fourth as was the *legatum dotis*—D. 33, 3, 1, 13. 35, 2, 81, 1—except as regards any value over and above the *dos*. *Restituzione della dote*, p. 380, n. 4. The *legatum dotis* was also unaffected by the restrictions of the *lex Julia et Papia*. P. Oxy. xvii, 2089.

[2] See Solazzi, op. cit., pp. 374–5. These advantages are sufficient to explain *Inst.* 2, 20, 15: 'valet legatum, quia plenius est legatum, quam de dote actio.'

[3] C. Th. 4, 4, 7, pr. C. 5, 13, 1, 3a.

intention of the testator.[1] But there are good reasons for Czyhlarz's[2] view that the sole and proper function of the *edictum* was to raise this presumption of intended equivalent where the testator, in his bequest to his wife, had made no mention of dowry. And it did not always operate even in this limited sphere, for where there was a contractual duty to restore dowry, the woman retained the right to institute the *actio ex stipulatu* in spite of having accepted a legacy not expressed to be *dotis* or *pro dote*.[3] Where, on the other hand, the legacy was so specified, respect for the expressed intention, not the *edictum de alterutro*, limited the widow to a choice even though her *dos* was *recepticia*.[4]

After Justinian's enactment in C. 5, 13, 1, 3a (A.D. 530) the *edictum de alterutro* was no longer applicable. The rule then became that the legacy should be regarded as in addition to dowry unless there was clear evidence, such as the description *pro dote*, to show contrary intent: whereas, while the *edictum* survived, the rule had been that to claim both the widow must prove that her husband had wished her to have both.[5]

Privilegium exigendi.

The woman suing by *actio rei uxoriae* had what Justinian's Code 8, 17, 12, 1, describes as 'contra omnes

[1] See for example Esmein, *Mélanges*, pp. 56–8.

[2] Op. cit., pp. 476–9. Cf. Solazzi, op. cit., p. 386. As Czyhlarz says, Justinian abolished the *edictum de alterutro*, and there is no mention of it in D. 33, 4, or in D. 31, 53, 1, where nevertheless the woman appears as still limited to a choice. If these passages have escaped interpolation it is because the law remained as they state it. There was then something independent of the *edictum* which prevented duplication when the *legatum* was stated to be *dotis* or *pro dote*. This was the theory of intention, and it is expressly preserved, not introduced, by Justinian in C. 5, 13, 1, 3.

[3] Arg. D. 24, 3, 46. [4] Arg. D. 33, 4, 16. [5] D. 33, 4, 16.

paene personales actiones . . . privilegia'.[1] She ranked, that is to say, before almost all creditors whose claims were not secured by real pledge. The *paene* admits certain preferred claims, and may be a reference to the privilege of the *fiscus* and of the creditor for funeral expenses.[2] Possibly, too, a creditor dating from before the constitution of the dowry may have taken precedence: this at least appears to have been true where such creditor was a public authority.[3] The *privilegium* was a concession to the expediency of keeping women dowered,[4] and was personal to the woman, being refused to her heirs.[5] The reasons which justified it in regard to the *actio rei uxoriae* ought also to have been sufficient to attach it to *actio ex stipulatu*, but the evidence is rather against any priority for this action.[6]

Justinian sharpened and resharpened the woman's legal weapons. By a constitution of A.D. 529, C. 5, 12, 30, he replaced her *privilegium*, for most purposes, by a *utilis vindicatio* and a hypothecary action against all *res dotales* or *ex dote comparatae* not validly alienated by the husband.[7] In C. 5, 13, 1, A.D. 530, the hypothec

[1] Justinian refers the privilege to *antiquae leges*. It is frequently mentioned in the Digest in excerpts from classical jurists, e.g. D. 15, 1, 52, pr. 42, 5, 17, 1; 19, pr. 46, 2, 29.

[2] Czyhlarz, *Dotalrecht*, p. 407, citing Paul, *Sentences*, 5, 12, 10.

[3] C. 5, 12, 9. [4] D. 42, 5, 18–19. [5] C. 7, 74, 1.

[6] Czyhlarz, op. cit., p. 407, argues from the general *raison d'être* of the privilege, and from its extension to *sponsa* reclaiming property given as dowry for a marriage which has not been validly celebrated (D. 23, 3, 74. 24, 3, 21, 13), in favour of its availability for *actio ex stipulatu*. But his *argumentum a contrario* from D. 46, 2, 29, turns rather against him. See Girard, *Manuel*, p. 976, n. 5.

[7] The 'si tamen extant' of C. 5, 12, 30, pr., is variously interpreted as meaning (*a*) 'still in the husband's estate when the marriage is dissolved' (Solazzi, op. cit., p. 447, n. 3); or (*b*) 'still existing in nature'. Cf. Czyhlarz, op. cit., p. 413, and Girard, *Manuel*, p. 979, n. 4.

becomes general, affecting the husband's whole estate and dating from the constitution of the dowry or the marriage, whichever is the later. C. 8, 17, 12, A.D. 531, gives this general hypothec precedence over earlier pledges.

Retentiones. The husband called upon to restore dowry may withhold a portion or even the whole of it on proof of certain special circumstances. He is entitled to *retentiones propter liberos*, *propter mores*, *propter impensas*, *propter res donatas*, and *propter res amotas*.[1]

Propter liberos. The *retentiones propter liberos* are allowed, as against a former wife, only after a divorce occasioned by her or her *paterfamilias*.[2] One-sixth may be kept for each child, but the maximum *retentio* under this head is one-half the dowry. As against a paternal ascendant claiming *dos profecticia* after his female descendant's death, one-fifth may be retained for each child without any limitation,[3] and the claim is here of course independent of *culpa* on the wife's side.

Only the husband or his *paterfamilias*, not their heirs,[4] may claim *retentiones propter liberos*, and in no case will they be due where the marriage is terminated by the husband's death. An agreement providing for *retentiones* in the last-named eventuality is void.[5] On

[1] Ulpian, *Reg.* 6, 9.

[2] Cicero, *Top.* 4, 20. Ulpian, *Reg.* 6, 10: 'si culpa mulieris aut patris . . . divortium factum sit.' Certain reasonable grounds for divorce, probably exonerating either side of *culpa*, are mentioned in D. 24, 1, 60–1. These are, for example, *sacerdotium*, *sterilitas*, *senectus*, *valetudo*, *militia*. Divorce on these grounds is described as 'bona gratia'. D. 24, 1, 62, pr. But the context here assumes agreement between the consorts.

[3] Ulpian, *Reg.* 6, 10 and 6, 4. F. V. 108.

[4] D. 24, 3, 15, 1, where 'compensationes' is an interpolation for 'retentiones'.

[5] D. 23, 4, 2. C. 5, 14, 3. D. 33, 4, 1, 1. For the suspected 'ipsa in

the other hand, there is nothing to indicate that these *retentiones* were not good against the heirs of the woman in the rare cases where her death left them entitled to proceed with an *actio rei uxoriae*.

Propter mores.

Whether or not there are children, the innocent[1] husband who divorces a misconducted wife may meet her demand to have her dowry back by *retentio propter mores*. For adultery he may keep one-sixth; for less serious offences one-eighth.[2] His heirs, when summoned to restore, are not entitled to withhold anything on this account, nor can any *retentio propter mores* be made good after the divorced woman's death.[3]

Retentiones propter liberos and *propter mores* may be cumulative.[4] Neither type finds any application where the *dos* is *recepticia* unless the stipulation giving it that character provides therefor.[5] The *retentio propter mores*, though explicitly abolished only by Justinian in C. 5, 13, 1, 5, A.D. 530, had, as this text informs us, become unnecessary owing to earlier legislation—a reference probably to the constitutions of A.D. 421 and 449, C. Th. 3, 16, 2, and C. 5, 17, 8, which, when they gave the husband the right to divorce with impunity for certain reasons only, gave him in the same circumstances the right to keep the whole dowry.

matrimonio decedit vel' in the last passage, see Czyhlarz, op. cit., p. 434.

[1] D. 24, 3, 47.

[2] Ulpian, *Reg.* 6, 12. The excessive wine-drinking mentioned in Pliny, *H. N.* 14, 13–14, may be taken as an instance of *mores leviores*. *Supra*, chap. v. § 4. Cf. Dio. Hal. *Antiq.* 2, 25.

[3] D. 24, 3, 15, 1, and C. Th. 3, 13, 1. Contra, though doubtfully, Czyhlarz, op. cit., p. 336, n. 12. For the *judicium de moribus*, see above, ch. v. § 4.

[4] Czyhlarz, op. cit., p. 343.

[5] See above, p. 182, n. 4.

Propter impensas.

Necessary expenditure on the dowry reduces *pro tanto* the amount to be restored.[1] Where the dowry consists of money, the reduction is of course direct; but in relation to other things the *retentio propter impensas* means that the whole or part is kept back until reimbursement for expenditure has been secured.[2]

In *Regulae* 6, 15, Ulpian defines *necessariae impensae* as those required to prevent deterioration. Paul describes them in D. 25, 1, 4, as expenditure which the husband in the accomplishment of his duty of care is bound to undertake, failure to do so rendering him liable to condemnation in damages if the wife eventually institutes an *actio rei uxoriae*. Examples are furnished by both jurists, such as repairs for a falling house, the building of a necessary granary, replanting of a ruined olive orchard, and medical care for slaves.[3] There are two other classes, *impensae utiles* and *impensae voluptuosae* or *voluptariae*. In the passages cited, Ulpian defines the first as those which make the dowry more fruitful, as where vines or olives are added; the second are luxury expenses designed not to prevent deterioration or increase revenue but to add to the pleasures of occupancy or use, as where pleasure gardens or paintings are installed.

[1] 'Necessariae impensae ipso jure dotem minuunt.' D. 23, 2, 61. 33, 4, 1, 4; 2, pr. and *passim*. Upon *retentiones propter impensas* in general, see Fr. Schulz in Z. S. St. 34, 1913, pp. 57–106.

[2] D. 23, 3, 56, 3. 25, 1, 5, pr. 33, 4, 1, 4. In the first of these texts Paul cites without disapproval Scaevola's opinion that where the *expensae* equalled the value of the objects in the dowry these objects ceased to be dotal. For the controversy arising out of this, see Czyhlarz, op. cit., pp. 283 et seq.; and Fr. Schulz, loc. cit. Schulz, rightly, I believe, argues that Paul wrote 'non desinere'. The compilers dropped 'non' and added 'uti . . . obtulerit'.

[3] D. 25, 1, 1–4. Where *dos* consists of merchandise, ornamentation may pass as *utilis* expenditure.—D. 25, 1, 10.

For *impensae utiles* there is a *retentio* provided the wife consented to the outlay.[1] Further than this the texts do not go, though, failing such consent, the husband must have had the same right to remove the improvement, where this could be done without damage to the dowry, as was allowed him in the case of *impensae voluptariae*. Where the woman obstructs harmless removal of a luxury improvement, *a fortiori* of one which is *utilis*, a *pro rata* retention is available. Apart from such obstruction, nothing can be withheld for *voluptariae impensae*, even where these were incurred with the consent of the wife.[2]

Propter res donatas. Ulpian, *Reg.* 6. 9. C. 5, 13, 1, 5a.

Where a gift between husband and wife was not saved by one of the numerous exceptions to the general prohibition, the object given or its value could be reclaimed by *vindicatio* or *condictio*.[3] To these sanctions there was added a *retentio propter res donatas*, by which the defendant in an *actio rei uxoriae* could withhold from dowry an equivalent for any invalid gifts made by the husband.[4]

Propter res amotas. Ulpian, *Reg.* 6, 9. C. 5, 13, 1, 5b.

As in the case of the *retentio propter res donatas*, our knowledge of the *retentio propter res amotas* rests more upon inference than direct information. Neither is treated in the *Regulae* with the detail devoted to the other *retentiones*; and the Digest, for the simple reason that all *retentiones* were abolished by Justinian,[5] either omits or interpolates the passages in which the subject had been dealt with. Since, however, Justinian cites as

[1] D. 25, 1, 7–8. C. 5, 13, 1, 5e. [2] D. 25, 1, 7–11. Cf. D. 33, 4, 5.

[3] See above, pp. 114–17, and C. 5, 13, 1, 5a.

[4] D. 24, 1, 50, pr.; 66, 1. 25, 2, 23. *Exactio*, *repetitio* and *actio* in these passages are interpolations for *retentio*, as the *deduci* following the *repeti* in D. 24, 1, 66, 1, makes particularly obvious. The husband's heir may claim the *retentio*—D. 24, 3, 15, 1. [5] C. 5, 13, 1, 5–5 f.

his reason for doing away with this *retentio* the fact that the *actio rerum amotarum* is always available,[1] we are justified in assuming that the rules set out in D. 25, 2 on the *actio* applied, *mutatis mutandis*, to the *retentio*.

The circumstance justifying *retentio propter res amotas* was the appropriation by the woman, in view of an approaching divorce, of movables belonging to the husband or his *paterfamilias*. The *retentio* would appear not to have been allowed against an *actio ex stipulatu* for *dos recepticia*,[2] but where it was available for a husband it was also accorded to his heir.[3] On decease of the woman after divorce, the *retentio* could be enforced against her *paterfamilias* or heir at least to the extent of their enrichment.[4] The contemplated divorce must have taken place: in no other mode of dissolution was this remedy granted.[5] Presumably what was retained was a portion of dowry equivalent in value to the stolen object.

Actio rerum amotarum.

The only observations that need be made with particular reference to the *actio* are (*a*) that it was available not only, as the *retentio* was, against a wife, but also against a husband who made away with movables belonging to the wife's side of the household; (*b*) that it was a substitute for the *actio furti* which the former consorts were prohibited, *in honorem matrimonii*, from using against one another for thefts committed during the marriage;[6] and (*c*) that, because of the delictual

[1] C. 5, 13, 1, 5b.
[2] C. 5, 13, 1, 5f.
[3] D. 25, 2, 6, 2.
[4] D. 25, 2, 3, 4; 6, 3.
[5] D. 25, 2, 11, pr.; 25. The action could not be brought while the marriage subsisted [the proper recourse being a *condictio* or *vindicatio* (D. 25, 2, 25)], except, after Justinian's enactment in C. 6, 2, 22, 4–4c, where a thing borrowed by the husband was stolen by his wife.
[6] See for the rule and exceptions, more apparent than real, D. 25, 2, 1; 2; 3.

nature of the act on which it lay, the defendant was refused the *beneficium competentiae*.[1]

When all questions as to what is to be given back are disposed of, non-fungible objects become restorable at once, but fungibles may be returned in three annual instalments.[2] When these terms are applicable, the judge in the *actio rei uxoriae* calls upon the defendant to produce adequate security for payment when due.[3] The restitution terms may be shortened as a penalty for misconduct on the part of the husband. Thus, for *mores majores*, he must restore at once: for *mores minores*, in six months.[4] Where the dowry, being non-fungible, is in any case restorable at once, the husband guilty of similar offences is condemned to pay the equivalent of the revenue which he would derive from the property if it were left in his hands for the periods customarily allowed in the cases of fungibles.[5] A distinction other than fungible and non-fungible and a new restitution-term were introduced by Justinian, who laid it down in C. 5, 13, 1, 7a–7b, that immovables were to be handed back at once, and movables in one year.[6]

Restitution dates.

[1] D. 25, 2, 21, 6.

[2] Ulpian, *Reg.* 6, 8. C. 5, 13, 1, 7a.

[3] D. 24, 3, 24, 2.

[4] In three half-yearly instalments, according to Solazzi, *Restituzione della dote*, pp. 273–5.

[5] Ulpian, *Reg.* 6, 13. See Czyhlarz's explanation of this difficult passage in *Dotalrecht*, pp. 361–2, and, for a variant, Solazzi, loc. cit.

[6] The division of fruits, between the restorer of dowry and the person to whom it was restored, for the year or other fruit-bearing period in which dissolution took place, was made the subject of detailed calculations, into which I do not propose to enter. The texts are D. 24, 3, 5–8, and explanations are provided by Czyhlarz, op. cit., pp. 238–56. See also Wiedemann, Z. S. St. 7, Heft 2, p. 106, and Bonfante, *Scritti Giuridici Varii*, 1, pp. 72 et seq.

Restitution during marriage.

The husband who becomes insolvent during marriage may be called upon to restore the dowry at once. To secure immediate restitution, the wife has merely to show that her consort's fortunes have sunk so low as to imperil her right of eventual recovery. When he is a *filiusfamilias*, the insolvency of his *pater* has of course the same effect. The disinherison of a *filiusfamilias* is held to be a sufficient menace to the dowry to justify proceedings as soon as the instituted heirs have accepted. For, though the husband is in late law accorded a *utilis actio* to take the place of the usual *praeceptio*,[1] the disinherison may leave him with so little else that it becomes inexpedient to entrust him with the administration of the dowry.[2]

Where the husband voluntarily hands back the dowry during the marriage, except for certain specified purposes, the act, being looked upon as a gift, is invalid and does not release him from his dotal obligations.[3] The circumstances in which this voluntary restoration puts an end to the dotal relation and deprives the wife of any further rights are enumerated in D. 23, 3, 73, 1. 24, 3, 20. Most of them have to do with the relief of distress suffered by the wife herself or her relations, but the payment of debt or the purchase of a good farm also figure in the list.

Pacta dotalia.

The common law incidents of dowry could be substantially modified by agreement between the consorts or their *patresfamilias*. We have already dealt with *permutatio dotis*,[4] which is one example of *pactum dotale*: there were many others. Thus the amount of the *retentiones*

[1] D. 33, 4, 1, 9. See above, p. 178–9.
[2] D. 24, 3, 24, pr.—1. C. 5, 12, 30, 2.
[3] C. 5, 19, 1.
[4] Above, pp. 176–7.

propter liberos might be altered, though the penalties for *mores* might not.[1] The terms for restitution were subject to shortening, but not to lengthening, by agreement.[2] Part of the fruits might be added to the capital of the dowry, or might be appropriated to some use interesting the woman alone. The whole product indeed might thus be disposed of, provided the woman agreed to support herself. But any surrender of fruits without counter-prestation on the wife's part must be settled before the marriage, to avoid the law against gifts between consorts.[3] An agreement totally excluding restoration was usually void, but if it contemplated only a divorce occasioned by the wife after the birth of children of the marriage, it was given effect to.[4] The wife was not allowed to contract herself out of the right to care on the part of her husband in his dealings with the dowry: a convention limiting his duty to mere abstention from *dolus* was void. On the other hand the consorts could, by mutual consent, alter the incidence of the loss resulting from accidental destruction.[5] The restrictions upon *pacta dotalia* are frequently attributed to a general rule prohibiting diminution of the woman's common law rights of recovery.[6] Such a principle is indeed suggested by several of the texts,[7] but how general it was is a matter of doubt. There were at any rate exceptions—witness the case of divorce *intervenientibus liberis* and the shifting of risks. Two passages in the Digest seem to negative the existence of any rule. D. 23, 4, 7, contemplates the possibility of the

[1] D. 23, 4, 23–4, and 23, 4, 5, pr.
[2] D. 23, 4, 14–18.
[3] D. 23, 4, 4; 28; 31.
[4] D. 23, 4, 16; 2. 33, 4, 1, 1. F. V. 120. C. 5, 14, 3.
[5] D. 23, 4, 6.
[6] e.g. by Czyhlarz, op. cit., pp. 429 et seq.
[7] D. 23, 4, 14; 17; 29, pr. F. V. 120.

wife's contracting to her prejudice, without specifying the nature of the contract, and D. 4, 4, 48, 2, mentions an *in integrum restitutio* available to the woman under twenty-five who suffers loss in this way. Such a remedy was needless if there was a rule invalidating prejudicial agreements. In fact the restrictions upon the husband's capacity to diminish *his* rights are as striking as those protecting the woman's interest. Thus, he may not waive in advance of dissolution his *retentiones propter mores*, *propter res donatas*, *propter res amotas* or *propter impensas*,[1] his *beneficium competentiae*,[2] or, wholly and without equivalent, his rights to fruits.[3] It must of course be borne in mind that the effect of these restrictions on both sides is simply the unenforceability of the preliminary undertaking to renounce. Once the marriage is dissolved and the cause of action has arisen either party is free to abstain from exercising the rights accorded by law.[4] Moreover, an agreement to waive *retentiones ob res donatas vel amotas vel impensas*, made after divorce but before the action, is binding, according to Paul in D. 23, 4, 20, pr.; nor is it by any means certain, as Czyhlarz[5] would have us believe, that the *impensae* here referred to are only *impensae utiles*.

Lucrum dotis. Originally, what a wife brought with her became the irrevocable property of her husband. We have seen how far this condition of things had changed in the period of the classical jurists. Yet the classical law clearly recognized circumstances in which a husband retained

[1] D. 23, 4, 5. [2] D. 24, 3, 14, 1. [3] D. 24, 4, 4.

[4] See, for example, D. 23, 4, 20, pr.

[5] Op. cit., p. 431, n. 2. The arguments brought forward by Czyhlarz fail to demonstrate the impossibility of excluding by private agreement after divorce even that *ipso jure* diminution of dowry which results from *impensae necessariae*.

a large part or the whole of dowry. He was then said *lucrari dotem*, and this happened most frequently when the marriage was dissolved by the woman's death, though it might also occur, by special agreement, in the event of divorce *intervenientibus liberis* occasioned by the wife. To these was added, by laws of Honorius and Theodosius (C. Th. 3, 16, 2, A.D. 421; C. 5, 17, 8, A.D. 449), a further case of *lucrum dotis* by way of discouragement to divorce. Apart from any agreement, and whether there were children or not, the woman who divorced without one of the reasons specified in this constitution, or who furnished her husband with one of the specified reasons for divorce, lost all claim to her dowry. But where there were children the husband might not alienate such property *inter vivos* or by will in such a way as to deprive them of its benefit.

Justinian so reformed the law that the husband, though still technically owner during the marriage, rarely retained the property when the union was dissolved, whatever the mode of dissolution. In the first place, his merger of the *actio rei uxoriae* in the *actio ex stipulatu*, which proceeded upon the basis of an assumed stipulation to restore even where no such agreement had been made, left the wife's heirs in all cases with the same claim to restitution as she herself had had.[1] Secondly, the abolition of the *retentiones* removed a whole group of reasons for reducing the amount to be restored.[2] Finally, even where the wife forfeited her

[1] C. 5, 13, 1, pr.—4.

[2] C. 5, 13, 1, 5–6. The husband retains the right to remove luxury improvements unless the wife reimburses him (D. 25, 1, 9; Fr. Schulz, Z. S. St. 34, 1913, pp. 60–7). For *impensae utiles* he has an *actio mandati* or *negotiorum gestorum* according as the woman has or has not consented to the expenditure (C. 5, 13, 1, 5e). *Impensae necessariae*

dotal claim by infidelity or capricious divorce, the husband got only a usufruct of the dowry, the property in it going to the children of the marriage.[1] Only one occasion for a *lucrum dotis* seems to survive this legislation of Justinian, namely, where the wife loses her claims as a penalty and there are no children in whom the property can vest under Novel 98. Such is the law governing the devolution of dowry where no special agreement has been entered into by the consorts. But it seems to have remained open to the husband to arrange by *pactum* that all or part of the dowry should remain with him on the predecease of the wife.[2] All such pacts must provide that the same proportion of *donatio ante nuptias* should in corresponding circumstances accrue to the widow,[3] and neither widow nor widower got more than the usufruct if there were children, for the property was secured to them by Novel 98, c. 1.[4]

Parapherna.[5] In free marriage the wife *sui juris* often has property of her own, not made over to her husband in dowry. Literary texts of the Republic and early Empire present

deprive the object of its dotal character up to the amount of expenditure, subject to the wife's right to restore its dotal character by paying that amount (C. 5, 13, 1, 5e. D. 23, 3, 56, 3. Fr. Schulz, op. cit., pp. 61 and 75–87). For *res donatae*, Justinian leaves the donor to his *actio in rem* or *condictio* (C. 5, 13, 1, 5a).

[1] Nov. 98, chapters 1 and 2, A.D. 539.

[2] C. 5, 13, 1, 6—'si decesserit mulier constante matrimonio, dos non in lucrum mariti cedat nisi ex quibusdam pactionibus. . .'

[3] C. 5, 14, 9 and 10.

[4] Nov. 127, c. 3, A.D. 548, rewards the consort who abstains from a second marriage by granting an aliquot share with the children in the property of *dos* or *donatio* in addition to the usufruct.

[5] Castelli, *I παραφερνα nei papiri greco-egizii e nelle fonti romane*, in *Scritti Giuridici*, Milan, 1923, pp. 1–94. Bonfante, *Corso*, 1, pp. 373–7. Windscheid, *Lehrbuch des Pandektenrechts*, § 507.

her administering such property, subject to the diminishing limitations of perpetual guardianship but otherwise at her own discretion. Cato[1] frowns at the moral consequences, and the vices of the procurators employed by women in the management of large separate estates are vividly portrayed by Cicero[2] and Martial.[3]

Several excerpts from classical jurists in the Digest, and a number even of the earlier constitutions in the Code, refer to this separate property as extra or *praeter dotem*.[4] In a doubtful passage Ulpian uses the Greek παράφερνα,[5] probably foisted upon him by the Byzantine compilers to whom the word is a technical term.[6] Occasionally the word *peculium* appears, probably by analogy with things handed over by a husband to his wife *in manu* or given by a father to his married *filia in potestate*.[7]

Over these extra-dotal objects, which may include anything from toilet articles to land, the husband has no rights other than those given him by specific agreement.[8] But already Scaevola[9] mentions a case where the husband has administered and owes an account. The passage of Ulpian already referred to contemplates the transfer of the *parapherna* to the husband in ownership as one possible arrangement. The claim to restoration on dissolution of the marriage then takes the form of a

[1] Aulus Gellius, 17, 6, 1. [2] *Pro Caec.* 5, 14. [3] *Ep.* 5, 61.
[4] D. 35, 2, 95, pr. 37, 7, 8. 39, 5, 31, 1. C. 4, 12, 3. 5, 16, 17. 5, 14, 8.
[5] D. 23, 3, 9, 3—on which see Riccobono in Z. S. St. 34, p. 250; Castelli, op. cit., pp. 66 et seq.; Bonfante, *Corso*, 1, 375–6.
[6] Cf. C. 5, 14, 8 and 11. Nov. 97, c. 5.
[7] F. V. 112. D. 23, 3, 9, 3. 39, 5, 31, 1. For *peculium* given by *paterfamilias*, see D. 6, 1, 65, 1.
[8] C. 5, 16, 17. 5, 14, 8. [9] D. 35, 2, 95, pr.

condictio. An alternative is to make an inventory, signed by the husband, and then to entrust the *parapherna* to him in the capacity of depositary or mandatory. Or, finally, the woman may keep the objects in her own hands, in which case she has the *actio ad exhibendum* or the *actio rerum amotarum* against her husband if he appropriates them against her will. The text bears traces of interpolation, but there is nothing inherently improbable in the supposition that such arrangements were made as early as the end of the second century A.D.

In C. 5, 14, 11 (A.D. 530), Justinian lays down a number of rules which are expressly designed for the case where the wife hands over to her husband as *parapherna* the *cautiones* representing interest-bearing loans, but which may well have applied generally to all separate property so dealt with. To the extent of their application, they establish a régime remarkably like that of dowry. The husband may expend the revenue in his and his wife's joint interest, which would include the maintenance of their household: he may bring action without the surety demanded of a procurator: his wife has a general hypothec against his property for the capital: and he must display *diligentia quam in suis* in his administration. There is of course the difference that the wife remains owner, retains the power of determining any new disposition to be made of the property, which she may take back at any time, and may take any legal proceedings out of her husband's hands.

CHAPTER VII

DONATIO ANTE NUPTIAS

AT Rome, as in Greece, Egypt, Gaul, Germany, and Spain,[1] it was usual for *sponsus* to make presents to *sponsa*. The custom may have been a survival from the time when marriage was purchase and a real price was paid for the bride. The *lex Cincia* includes *sponsa* in the list of persons to whom gifts unlimited in amount may be given.[2] *Dona nuptialia* are mentioned by Cicero, *pro Cluentio* 9, 28, and by Capitolinus, *Maximinus Junior* 1, 7. Juvenal, *Sat. VI*, 201 et seq., describes them as given *prima pro nocte*, and the notion that they are a *pretium pudicitiae* appears again in the later imperial texts.[3]

Already in classical times the jurists note a difference in these gifts according as they are intended to pass definitively to the recipient or to revert to the donor in the event of marriage not taking place. The former are said to be *donationes simplices*, the latter *adfinitatis contrahendae causa*. Of the latter Papinian says in F. V. 262 that they are forfeited if the *sponsus* breaks off the match without just cause.

To be valid the gift must convey the property before the marriage. The celebration, that is to say, may be made a resolutive but not a suspensive condition, because the latter practice offends against the rule prohibiting gifts between consorts.[4]

[1] Mitteis, *Reichsrecht*, pp. 266 et seq, and *Papyruskunde*, 2, 1, pp. 224–6.

[2] F. V. 302.

[3] '*Praemium pudicitiae*': C. 5, 16, 24, A.D. 321; '*Pro pudore perceptum*': Nov. Valent. 35, 8, A.D. 452.

[4] Julian in D. 39, 5, 1. Gordian in C. 5, 3, 4, A.D. 239. But such gifts

The difference between the *donatio simplex* and that given *adfinitatis contrahendae causa* was done away with by Constantine (C. 5, 3, 15, A.D. 319). His enactment made the gift between *sponsus* and *sponsa* in all cases conditional on marriage, but deprived the party responsible for an unjustified breach of promise of the right to recover. By a subsequent constitution, the same Emperor decreed that where one of the betrothed dies before marriage, but after the betrothal kiss (*osculum*), half of the bridal gift should remain with *sponsa* or her heirs.[1]

There is still, however, a great gulf between the *dona nuptialia*, otherwise known as *sponsalicia largitas*, of Constantine's time and the *donatio ante nuptias* of the fifth and sixth centuries. The former becomes on marriage the absolute and irrevocable property of the wife: the latter is a counterpart of dowry, serving partly as a penalty for unjustified divorce by the husband and partly as an extra provision for the widow. *Donatio ante* or *propter nuptias* does not develop out of *sponsalicia largitas*:[2] it is an importation from the East, established beside the native institution, which it does not replace.[3] Gifts which on marriage become the absolute property of the wife continue to be given by *sponsus*. *Donatio ante nuptias* is so thoroughly specialized in its incidents, and these incidents differ so widely from those of the *donatio maritalis*[4] known to the classical jurists, that Justinian speaks of the institution

are made valid by the Sc. of Severus and Caracalla provided the husband dies without revoking. Ulpian in D. 24, 1, 32, 22.

[1] C. 5, 3, 16, A.D. 336, and see above, p. 19.

[2] Mitteis, *Reichsrecht*, pp. 304 et seq. See also Bonfante, *Corso*, 1, 379–87, especially p. 384, n. 3.

[3] See above, p. 19.

[4] C. 5, 16, 24, 1.

in his day as a thing which *veteribus quidam prudentibus penitus erat incognitum.*[1]

In the West the woman frequently brought back as dowry the gifts she had received. This practice was known to Paul,[2] and is mentioned in constitutions of Severus and Caracalla,[3] Diocletian and Maximian,[4] and Theodosius and Valentinian.[5] It is clear from C. 5, 17, 8, 4b and 5, that the husband has sometimes retained or got back the *donatio ante nuptias*; sometimes handed it over and left it with his wife. There was apparently no imperative rule in this regard. When the *donatio* was added to *dos* it formed a supplement to the establishment and ordinarily shared the fate of the dowry.[6] Thus, in the absence of agreement, it would remain with the husband on his wife's death, the only question being what happened to it when the wife's father recovered *dos profecticia*. Presumably, if it had been added to the dowry, this portion of the dowry would be treated as *adventicia*. In cases of divorce, the various *retentiones* would apply to it as to the rest of the dowry. When Theodosius and Valentinian in A.D. 449 introduced their statutory penalties for capricious divorce the *donatio ante nuptias* was treated in the same way as the *dos*. All right in it was forfeited by the consort who divorced without one of the recognized reasons or who furnished a recognized reason for divorce.[7]

In the East *donatio ante nuptias* was a necessary part of legal marriage.[8] The Syro-Roman Law Book

[1] *Inst.* 2, 7, 3. [2] D. 6, 2, 12, pr. [3] C. 5, 3, 1.
[4] C. 5, 3, 14. [5] C. 5, 9, 5, 1.
[6] Esmein, *Mélanges*, p. 66. [7] C. 5, 17, 8, 4–5.
[8] Mitteis, *Reichsrecht*, pp. 290 et seq. and 296; *Papyruskunde*, 2, 1, pp. 224 et seq.; Collinet, *Études historiques sur le droit de Justinien*, p. 151.

mentions as a noteworthy fact that in many countries φερνή and δωρεά are not essential, and that marriage may be celebrated with full validity in verbal form, the bride being crowned with a wreath and led in procession to her future home.[1] Justinian's Code, 5, 14, 9, 1, reproduces a constitution of Leo and Anthemius, A.D. 468, which, while establishing the rule that the proportion of *dos* and *donatio ante nuptias* to be gained by husband and wife respectively in the event of the other's death must be equal, points out that *dos* and *donatio* need not be equal or bear any fixed relation. On the other hand the Syro-Roman Law Book,[2] in a passage purporting to record the law of Leo, declares that in the East the *donatio* must be equal to half the *dos*, while in Constantinople and the West it must be of the same amount as the *dos*. It has been suggested that the jurist is stating customs which established themselves after Leo's constitution of 468 and is distinguishing, not between the Eastern and Western Empires, but between the Eastern and Western (European) Provinces of the Eastern Empire.[3] Certainly there is no trace of any rule of equality in the Digest or Code, and it is not until A.D. 539, Novel 97, that Justinian deals with the matter. Mitteis had come to the conclusion that the Paris, Arabian, and Armenian MSS. of the Law Book were later than Novel 97, and regarded the Eastern practice which they mention as a striking example of the persistence of local custom at variance with imperial

[1] Sachau, *Syrische Rechtsbücher*, I, p. 83. Rome MS. II, § 52. London MS. § 93.

[2] Sachau I, p. 81. R. II, § 51; R. III, § 93; P. § 40; Ar. § 51; Arm. 45. L. 92, the earliest of the MSS., does not contain these details.

[3] Collinet, op. cit., pp. 148 and 151.

legislation.[1] But the discovery of the three Vatican MSS.—R I, R II and R III—has cast some doubt on the view that the alleged custom of equality between *dos* and *donatio* is a reflection of Justinian's Novel, and if R II is really an accurate reproduction of a model existing before the codification, cause and effect were the reverse of what Mitteis took them to be.

Amid all this uncertainty, it is generally agreed that the London MS. is earlier than Justinian's codification, and is itself the translation of an earlier Greek original. In § 92 it records rules on the disposal of *dos* and *donatio* in the event of divorce or death. The rule applying in divorce is identical with that set out in the constitution of Theodosius and Valentinian, C. 5, 17, 8, A.D. 449, but there is no Western source for the rule that the widow takes half the *donatio* along with all the *dos* and the widower half the *dos* with the whole *donatio*.[2] This may be the result of legislation by Leo himself as the Law Book (R II, § 51) suggests. But whether agreement to the contrary was excluded, or whether this law ever applied in the West, is doubtful.

In fact the development of *donatio ante nuptias* is still, as Mitteis described it in 1891,[3] a mass of imponderables. What we know of it in its final characteristics as given in the Corpus Juris may be summarized thus:

(1) It must be equal to the dowry—Novel 97, chapters 1 and 2, A.D. 539.

[1] *Reichsrecht*, pp. 291–3.

[2] The Arabian MS., § 44, and R. II, § 44, ascribe somewhat similar provisions to a law of Theodosius. See Mitteis, *Reichsrecht*, pp. 248 et seq. and 308–9. The Law Book here contradicts C. Th. 3, 16, 2, in regard to the disposal of dowry.

[3] *Reichsrecht*, p. 256.

(2) It may be given during marriage, whereas in the earlier law it must precede the celebration. Justinus (C. 5, 3, 19, A.D. 527) had allowed *donatio* to be increased, or even first given, during marriage, provided the increase or gift was in consideration of an increase in the dowry. Justinian made it unconditionally legal to make the gift during marriage, and accordingly changed its name to *donatio propter nuptias*—C. 5, 3, 20, A.D. 531–2.

(3) The proportions of *dos* and *donatio* to be gained by husband or wife in certain events must be equal —C. 5, 14, 9, A.D. 468; C. 5, 14, 10, A.D. 529.

(4) Immovables belonging to the *donatio* are inalienable and unpledgeable except with elaborate precautions for the wife's consent, which must be repeated after two years. Even then the alienation or pledge is valid only if the husband continues to have sufficient property to make up the *donatio*—Novel 61, A.D. 537.

(5) Where the marriage is dissolved by the husband's death, or by a divorce not due to the wife's fault, the *donatio* falls to the woman, but only for a usufruct if there are children, the latter taking the property—C. 5, 17, 8, A.D. 449; Novel 98, c. 1, A.D. 539.[1]

(6) The *donatio propter nuptias* is exempt from the *insinuatio* required for ordinary gifts—Novel 119, c. 1, A.D. 544.

[1] For the effect of Nov. 127, c. 3, on this, see above, p. 202, n. 4.

PART IV

DISSOLUTION AND REMARRIAGE

CHAPTER VIII

MODES OF DISSOLUTION OTHER THAN DIVORCE

APART from death and divorce, there were four contingencies which are held to have affected, at one period or another of Roman law, the duration of marriage. These were (*a*) certain types of criminal sentence, (*b*) captivity, (*c*) absence, and (*d*) military enlistment.

I. *Deportatio, interdictio,* and *condemnatio in metallum.*

In the classical law the person against whom a judgement of *aquae et ignis interdictio* or of deportation had been rendered, being civilly dead, ceased to be married in the Roman legal sense. Reasons have been given in the course of the discussion on *matrimonium juris gentium* for regarding the recognition of continuing valid marriage as not earlier than the constitution of Alexander in C. 5, 17, 1 (A.D. 229). But it is abundantly clear that in the late Empire motives of humanity, or the Christian doctrine of indissoluble union, had so far prevailed over legal logic that, although the crime punished by deportation might for a time be treated as an occasion for divorce, the sentence did not effect an automatic dissolution.[1] A sentence which involved slavery also terminated marriage, and this continued to be the law so long as condemnation for certain crimes carried this *capitis deminutio maxima* with it. But in

[1] See above, pp. 104–5.

Novel 22, C 8. (A.D. 536), Justinian enacted that *condemnatio in metallum* should leave the convict a free man, and should have no effect upon his marriage. This was perhaps the sole surviving case where a well-born citizen became a slave. At any rate the Novel goes on to say 'et nullum ab initio bene natorum ex supplicio permittimus fieri servum'. On the other hand, the very next chapter provides that where an ex-slave or the child of an ex-slave forfeited liberty by judicial decision marriage should be dissolved as by death.

II. Captivity. Of all the jurists quoted in the Digest on the subject of captivity only one appears to entertain the view that it did not dissolve marriage. Julian says in D. 24, 2, 6, that the wife of the captive retains the position of a married woman, as indicated by the rule that she may not 'temere' remarry. But this passage was already regarded as interpolated by Cujas, and very few would now undertake to defend its authenticity. It demands for the time of Julian a five-year delay which, apart from the vague and suspect *post constitutum tempus* put in the mouth of Paul by D. 49, 15, 8, is not mentioned elsewhere until we find it laid down in the seventh chapter of Justinian's twenty-second novel.[1]

The captive was in the position of a slave, and there could be no legal matrimony with slaves. In the classical law therefore the marriage came to an end.[2]

[1] Levy, *Verschollenheit*, p. 150, restores D. 24, 2, 6, thus: 'libertae uxores patronorum qui in hostium potestate pervenerunt, possunt videre nuptarum locum retinere eo solo, quod alii nubere non possunt,' connecting it thus with the well-known provision of the lex Julia de Maritandis Ordinibus. For his discussion of D. 49, 15, 8, see ibid. pp. 172–5.

[2] Pomponius in D. 24, 3, 10, pr. (where the 'perinde... ac si' negatives the continuance of the marriage) and in D. 49, 15, 14, 1. Paul himself

The one possible exception was the case of patron and freedwoman, and the relevant text (D. 23, 2, 45, 6) shows that the jurists were not agreed upon this. If Julian thought the *liberta uxor* incapable of remarriage on her patron and husband's falling captive, his grounds were not necessarily those stated in the text as we now have it, namely, the continuance of her union with the patron. An interpretative extension of the provisions of the *lex Julia de Maritandis Ordinibus*, such as to deprive the *liberta* of *conubium* where the dissolution was due to captivity as well as when it resulted from a divorce initiated by her, would have sufficed. Here, as in D. 24, 2, 6, the hand of the interpolator has probably been busy.[1]

The prevailing tendency is now to deny that the marriage terminated by the captivity of one spouse was restored in the classical period by *postliminium*. The true doctrine is held to be that propounded by Pomponius, D. 49, 15, 14, 1—'Non ut pater filium, ita uxorem maritus jure postliminii recipit; sed consensu redintegratur matrimonium'—where the last phrase is taken to mean an entirely new union. It may be admitted at once that the excerpt from Paul in D. 49, 15, 8, has been tampered with, but we need not therefore agree that Paul denied *postliminium*. Both texts seem to me to signify merely that the effective operation of *postliminium* was subject to the condition of the other consort's consent.[2] But if the refusal to resume

treats (according to Levy, op. cit., pp. 171–2 only by reason of interpolation) the return of one consort as a case for *postliminium* in D. 49, 15, 8. Marcian, D. 49, 15, 25. Tryphoninus D. 49, 15, 12, 4. Ulpian D. 48, 5, 14, 7—'benignius dicetur'.

[1] See Levy, op. cit., pp. 149–50, citing Beseler Z. S. St. 45, 198 ff; Solazzi, *Bull.* 34, 300 ff; Bonfante, *Corso*, 1, 242.

[2] Cf. Hartmann, Z. S. St. 1888, pp. 46–9.

matrimonial relations was not justified by some good reason it was punished by the *poenae discidii*, being equivalent to divorce.

The recent rejection of *postliminium* is due, more than to anything else, to the analogy now being insisted on between possession and the free marriage. Both, it is said, were *res facti*, and only *res juris* were automatically restored to the returned captive. Thus there is no objection to admitting *postliminium* in such a case as that discussed by Marcian in D. 49, 15, 25. There the consorts have been captive together: no interruption of the state of fact has occurred, and the sole effect of *postliminium* is to reinvest the state of fact with its legal significance. Finally when, in the fifth century, jurisprudence had set marriage above mere cohabitation and made it a legal relation depending solely upon consent, there was no longer anything to prevent *postliminium*, and the sort of retouching which appears in D. 49, 15, 8 was needed to bring the juristic texts into conformity with existing law.[1]

There are no doubt striking similarities between the rules pertaining to possession and those pertaining to marriage without *manus*; but to infer where there is a lack of certainty that the law of one institution was the law of the other is a hazardous proceeding. No Roman jurist has left us any record of his consciousness of the analogy or any example of arguing from possession to marriage. If the least violent treatment of the text

[1] The case is stated from Levy, op. cit., pp. 149, 171, and *passim*. The view that marriage in the fifth century depends solely on consent is set out in the same author's *Ehescheidung*, p. 103, and supported by his interpretations of the constitution of Theodosius and Valentinian in C. 5, 17, 8, pr. For criticism, see above, pp. 91–4.

results in a rule of *postliminium* with consent, the fact that this is out of harmony with the law of possession is not a good refutation.

When in Novel 22, c. 7, Justinian takes up the matter of captivity, he uses language which indicates that the law had continued up to that time (A.D. 535–6) to make captivity a termination of matrimony. The reason which he cites is not the solution of a *de facto*, quasi-possessory relation, but the slave-status of the captive. He enacts that henceforward marriage shall remain undissolved. So long as the captive is known to be alive the other consort may indeed remarry but with the forfeiture of *dos* or *donatio*. Remarriage apparently acts here as an unjustified divorce, otherwise it must have been punished, at least in the woman's case, as adultery.[1] To remarry with impunity, the captive's consort must wait for five years after it has become uncertain whether the captive is alive or dead. No *repudium* is necessary.

III. Absence.

There are some grounds for believing that from the early Republic until the time of Justinian the prolonged absence of a husband or wife and the ignorance of the consort at home as to the other's life or death justified remarriage.

The opening scenes of Plautus' *Stichus* represent a conflict between two daughters, who desire to wait faithfully for husbands absent and unheard of for three years, and the father who pretends to urge them to a new match. It is assumed that the sisters are at liberty to treat their union with the absentees as dissolved. Levy[2] argues that the same liberty is implied in the husband's complaint in Quintilian, *Declamatio*, 347.[3]

[1] Cf. Levy, *Verschollenheit*, p. 167.

[2] *Verschollenheit*, p. 155.

[3] Edition Ritter, pp. 366–9.

The wife there might have married again without reproach if she had but taken the trouble to inquire into the rumour of her husband's death and waited a reasonable time for more precise information. But this is by no means clear: the husband begins with the statement that his wife has committed adultery, since her marriage with him could only be terminated by divorce or death.

The most cogent juristic evidence is to be found in C. 5, 17, 7. There it is laid down by Constantine that the woman who has had no news for four years of a husband engaged in military service may remarry with impunity, provided she has first applied without result to the competent military commander and informed him of her intention. Unless this is to be taken as a unique discrimination against the soldier, it must be understood as a mere decision in a particular case, which happens to involve a military man, that all reasonable steps have been taken, and that the woman is justified in regarding herself as free. Justinian misunderstood the constitution as a rule setting up definite conditions under which a soldier's wife might remarry, thought it a hardship to the soldier, and, having first extended the delay to ten years, repealed it altogether.[1] After the law last mentioned she becomes free only on the proof of her husband's death, and then must wait a year after the rumour has been confirmed on oath by witnesses brought before the military authorities. If she takes a second husband simply by reason of long absence of the first, or without the precautions specified in the Novel, she and her second mate are punishable as for adultery. This makes it clear beyond peradventure that under the

[1] Nov. 22, c. 14, and Nov. 117, c. 11.

law of Justinian's time mere absence without news did not put an end to marriage.

Whether D. 48, 5, 12, 12, should be regarded as final proof of the dissolution of matrimony by absence in the age of the classical jurists is still doubtful. The text lends itself equally well to the interpretation that a reasonable presumption of death made the second union *legitimae nuptiae*, and that is another matter altogether. But on the whole the case for 'Verschollenheit' as a solvent of the conjugal bond, only rejected in the late Empire, seems reasonably well established.[1]

IV. Military Service.

The imperial legislation which deprived the soldier on the active list of his *conubium* also annulled, or suspended the legal effects of, a marriage validly concluded before enlistment. But this hard rule, which was probably established in the reign of Augustus, had broken down by the beginning of the third century as far as officers were concerned, and completely disappeared in the fourth.[2]

[1] The conclusions adopted here are in the main those of Levy's *Verschollenheit*.

[2] Meyer, *Konkubinat*, pp. 103 et seq. Mitteis-Wilcken, *Papyruskunde*, 2, 1, p. 283. See above, pp. 39–42. The continued validity of the soldier's marriage is of course assumed in C. 5, 17, 1 (Constantine) and in Novels 22, c. 14, and 117, c. 11.

CHAPTER IX

DIVORCE

I. Divorce in the *manus* marriage.

AULUS GELLIUS [1] explains the late appearance of the *actio rei uxoriae* by the fact that for about five hundred years there were no divorces at Rome. The development of proceedings by which the woman could recover dowry begins, for him, with the famous Carvilian episode. There is a remarkable concurrence in the tradition that this was the first divorce. Apart from Gellius it is so described by Dionysius of Halicarnassus,[2] Plutarch,[3] and Valerius Maximus,[4] though with a wide divergence as to date. If we follow Dionysius and Gellius, who at least approximately agree, we must place the incident at about 230 B.C.[5] But there is another passage of Valerius Maximus (2, 9, 2), confirmed as to date by Livy 9, 43, 25, recording that in 307–306 B.C. L. Annius repudiated his wife.[6] Moreover, Cicero (*Phil.* 2, 69) refers one of the acts signifying repudiation, namely, the taking back of the keys entrusted to the wife, to the XII Tables. The text as accepted by Girard[7] and Esmein[8] runs as follows: 'Illam suam suas res sibi habere jussit, ex XII tabulis claves ademit, exegit.' Its significance depends on the punctuation, for if the comma comes after 'tabulis' instead of after 'jussit', it is the verbal formula, not the removal of the keys, which found a place in the decemviral code.[9] This question,

[1] 4, 3. [2] *Antiq.* 2, 25.
[3] Lycurgus and Numa, 3; *Q. R.*, 14; Theseus and Romulus, 6.
[4] 2, 1, 4. [5] Cf. Brini, *Matrimonio*, 2, p. 24. [6] Below, p. 226.
[7] *Textes*, p. 14. [8] *Mélanges*, p. 19, n. 1.
[9] Thus Levy, *Ehescheidung*, p. 5, following Bruns, *Fontes*, *Leges*, p. 22.

being one of form, may be postponed. What is important now is the evidence that repudiation was practised in the middle of the fifth century before Christ.

Whether this evidence is to be regarded as strengthened by Plutarch, *Romulus*, 22, depends upon how far we should consider his contribution neutralized by that of Dionysius, *Antiq.* 2, 25. The substance of Plutarch's statement is that Romulus passed a law permitting husbands to repudiate their wives with impunity for adultery, for poisoning, or for counterfeiting keys. If they turned them out for any other reason they forfeited half their property to the woman and half to Ceres. The word ἐκβάλλειν may possibly, as Karlowa[1] argues, mean simply *de facto* expulsion, but this translation is scarcely adequate in the context, and the word is used in legal documents of the Eastern Empire with the apparent meaning of repudiation.[2] Dionysius says, in so many words, that the marriage by *confarreatio* was indissoluble under the law of Romulus. Many attempts in addition to that of Karlowa have been made to dispose of this contradiction. Among the more elaborate is that of Brini.[3] Brini, taking the first statement of Dionysius as referring to *manus* marriage in general at the beginning of Roman history, holds that he did not mean absolute indissolubility. The second statement, having to do with Carvilius, refers to divorce in the free marriage. The contrast explains the unqualified declaration. All that is meant is that the *manus* marriage did not have dissolubility, nonpermanence, as an innate legal quality and one of the elements determining its character, as the free marriage

[1] *Röm. Rg.* 2, 185.

[2] Levy, op. cit., p. 106.

[3] *Matrimonio*, 2, 103.

had. This explanation, for all the care with which it is prepared and presented, is hardly satisfactory. It seems more probable that Dionysius did believe that *confarreatio*, which he appears to have regarded as the sole original form of Roman marriage, and to which alone he refers, was not subject to voluntary dissolution. That, after all, is literally what he says. The real question is whether he was mistaken. Voigt[1] thinks that he was, that he extended to all marriages by *confarreatio* in the distant past an indissolubility which in his own day belonged only to the marriage of the *flamines*. Karlowa[2] and Esmein[3] think that he was right, but they do not infer the prohibition of divorce where *manus* had resulted from *coemptio* or *usus*.

The main difficulty in accepting the view that all marriages by *confarreatio* were at one time perpetual is that the records relating to the matter confine the prohibition of divorce to the *flamen*.[4] The voluntary dissolution of priestly marriages—whether the prohibition applied to the *flamines* in general or only to the *flamen Dialis* is doubtful—seems to have been impossible until the time of Domitian,[5] and was then only permitted on special request. If we start from an indissoluble *confarreatio* we must then assume a subsequent statute or custom, of which there is nowhere any mention, permitting divorce in all but the priestly marriage. On the whole the evidence is insufficient to justify the

[1] *Leges Regiae*, 6, p. 29, cited Brini, op. cit., 2, 88–9. [2] Loc. cit.

[3] *Mélanges*, p. 17, n. 3, citing Apuleius, *Metam.* lib. VI.

[4] Thus Festus, s.v. flammeo; Gellius 10, 15, 23; Plutarch, *Q. R.* 50; Servius *ad Aen.* 4, 29; Ovid, *Fasti*, 6, 231.

[5] Plutarch, *Q.R.* 50. H. J. Rose in his translation of the 'Questions', p. 192, suggests that the case was one of special indulgence granted by Domitian in his capacity as *pontifex maximus*.

assumption that the ancient rule relating to divorce in *confarreatio* was different from that which we find in force in historic republican times. Now, if Gellius is quoting from Fabius Pictor, whom he cites at the beginning of his chapter on the *flamen Dialis*,[1] the fact that the marriage of the *flamen* was indissoluble was something thought worthy of note as an incident of the office by a writer of the late third and early second centuries before Christ. At that time lay *confarreatio* may reasonably be supposed to have been still fairly common, and if Fabius Pictor considered perpetuity a peculiar quality of the priestly marriage we are justified in holding that it was not the form of union, but the office, that excluded divorce. That indeed is the reason given by Plutarch in *Quaestiones Romanae*, 50, for the prohibition.

It is obvious, of course, that *confarreatio* was rare at the end of the Republic. Possibly only the *flamines* married in that form. This might serve to explain the fact that the Roman writers mention only the *flamines* as forbidden to divorce, without weakening the view that *confarreatio* was always indissoluble, whatever the parties. But if it is the ancient Fabius Pictor who speaks in Gellius 10, 15, 23, this explanation loses something of its plausibility.

Any conclusion is a mere balance of probabilities, but in my view such hints as we have point, first, to the practice of repudiation in early Rome; secondly, to the dissolubility of *confarreatio*—except where the sacred office of the parties forbade divorce—and *a fortiori* of the other *manus* marriages. I regard *diffarreatio* therefore, not with Karlowa as a late invention of the

[1] 10, 15, 23.

priesthood,[1] but as an ancient institution which fell out of use and knowledge as *confarreatio* diminished in favour.

Plutarch[2] exclaims at the severity of the law of Romulus, which permits a man to repudiate his wife, but does not allow a woman to cast off her husband. This inequality, if it existed, was peculiar to the *manus* marriage, and its perfect conformity with the spirit of that institution goes some way to prove its reality. The woman under *manus* was in the position of a daughter, and it was clearly possible to exclude a daughter from the family. The daughter, on the other hand, could not of her own accord legally escape from the bonds of family.[3] The form referred by Cicero to the XII Tables is a marital repudiation, and such early divorces as are recorded all proceed from the husband.[4] It seems clear indeed that in the time of Plautus the initiative was often taken by the other side,[5] but it is obvious from other indications that the marriages contemplated by the comedian are anything but the strict union accompanied by *manus*.

In regard to the legal form of divorce in the *manus* marriage we have exceedingly little to go on. For *confarreatio*, there was apparently the equal and opposite formality of *diffarreatio*. This must have been rare in historic times, for the only evidence of its existence is late and extra-legal. Festus, *sub hoc verbo*, says: 'Diffarreatio genus erat sacrificii, quo inter virum

[1] *Röm. Rg.* 2, 186. [2] *Romulus*, 22.

[3] G. 1, 137a: 'Sed filia quidem nullo modo patrem potest cogere.'

[4] For example, those of Annius and Carvilius already mentioned. See also the list in Plutarch, *Q.R.* 14.

[5] See *Mil.* 1164–7, 1277–8; *Rud.* 1046–7; *Men.* 722–3. For divorce by the wife's *paterfamilias* see the extracts from Ennius, *Cresphontes*, in *Rhetor. ad Her.* 2, 24, 38.

et mulierem fiebat dissolutio; dicta "diffarreatio", quia fiebat "farreo" libo adhibito.'[1] Plutarch seems to have reference to this in *Q. R.* 50, when he briefly describes the procedure following Domitian's permission to the *flamen Dialis* to put away his wife. 'On that occasion,' he says, 'the priests were present at the ceremony of divorce, and went through numerous horrible, extraordinary and dismal rites.'[2] The mention of a *sacerdos confarreationum et diffarreationum* in the imperial inscription already cited[3] is the only other trace.

Where the source of *manus* was *coemptio* or *usus*, the method of dissolution was probably *remancipatio*. For *coemptio* this would seem to be demanded by the general rule of equal and opposite form.[4] The late republican jurist Gallus was perhaps thinking of divorce in the passage quoted by Festus *sub verbo Remancipatam*: 'Remancipatam Gallus Aelius esse ait, quae mancipata sit ab eo, cui in manum convenerit.'[5] In the period when *manus* was essential to the idea of marriage the exclusion of the woman from the family would necessarily dissolve the union. But by the time of Aelius Gallus the free marriage was predominant, and the effect of *remancipatio* alone may have been merely to transform a marriage with *manus* into one without it. For Gaius, at any rate, *remancipatio* and divorce are not one and the same thing. It is only after divorce, which she can now herself accomplish by

[1] Text from Bruns, *Fontes, Scriptores*, p. 7.

[2] The translation is that of H. J. Rose, op. cit., p. 142.

[3] C. I. L. 10, 6662. See above, p. 78, n. 2.

[4] D. 46, 3, 80. The antiquity of the rule is doubtful. See Mitteis, *Privatrecht*, p. 273, with notes 34 and 35.

[5] Brini, op. cit., pp. 124 et seq.; Girard, *Manuel*, p. 164. Text from Bruns, *Fontes, Scriptores*, p. 31.

repudium, that the woman under *manus* to the husband can demand remancipation.[1] Some evidence of the intention with which the *remancipatio* was undertaken may well have been demanded, and this was possibly the role of the *ademptio clavium* connected by Cicero with the XII Tables.[2] In the nature of things the divorcing husband would generally desire to exclude the woman from all legal connexion with his household, and we do not know of any means by which he could do this other than *remancipatio*. There is therefore strong reason for regarding this at least as an important element in the voluntary dissolution of the *manus* marriage.

Of one thing there is ample proof, both literary and juristic, and that is the usage of addressing certain traditional words to the repudiated consort. 'Tuas res tibi habeto' or 'agito' appears in Plautus,[3] Cicero,[4] Martial,[5] and the Digest.[6] In the last century of the Republic neither this nor any 'ademptio clavium' was obligatory, at least in the free marriage, otherwise there never could have been a controversy of the sort mentioned in Cicero's *De Orat.* 1, 40, 183–4; 1, 56, 238. A certain *paterfamilias*, having left a pregnant wife in Spain, came and settled at Rome. There he contracted a second union without having sent any sort of *repudium* to the woman in Spain. Both women had sons, and

[1] 1, 137a. It will be observed that I differ here from Brini, who holds that the divorce is only complete with the *remancipatio*, op. cit., 3, p. 81.

[2] See above, p. 218 of this chapter. I would not suggest that Antony's marriage with his 'mimula' was a *manus* marriage. The 'ademptio clavium' and the reference to the XII Tables are brought in of course by way of sarcastic solemnity.

[3] *Amphitryo*, 928.

[4] *Phil.* 2, 28, 69.

[5] *Ep.* 10, 41.

[6] 24, 2, 2, 1 (Gaius).

there was keen argument among the most eminent jurists, after the intestate death of the *paterfamilias*, as to the status of the second consort and her child. Could a first marriage be dissolved by a second, without more? Must there be *certa quaedam verba*? The question could obviously not have been seriously raised if there had been any law or established custom prescribing form.[1] It has also been observed that the variations in the formula are incompatible with any sacramental or legislative origin.[2] What the persistence of an imperative address by the divorcing consort and the frequent references to ejectment do show is that a traditional and normal element in divorce was some action, verbal or otherwise, making clear the intention of separation.[3] Our first record of any discussion as to whether such action was legally essential or not is the report in *de Oratore*, and it is unfortunate that Cicero does not tell us which side won. We are left to the inference that the law of a monogamous people cannot have suffered a series of marriages each automatically cancelling its predecessor. Such a condition would have rendered impossible any effective repression of adultery or bigamy, since the culprit could always take refuge in the allegation that

[1] Mitteis, *Privatrecht*, p. 152, n. 62, discusses the doubt as one raised by an advocate desperately attempting to make out some kind of case for the second marriage. Is it possible that he overlooked the second reference in *de Orat.* 1, 56, 238, where we are told 'fuit inter peritissimos homines summa de jure dissensio'?

[2] See, for example, Juvenal 6, 146: 'Collige sarcinulas, dicet libertus, et exi.' Varro, *Sat.*, quoted Marquardt, *Privatleben*, p. 70, n. 5: 'mulierem foras baetere jussit'; Titinius, *Gemina*, quoted Brini, *Matrimonio*, 3, p. 69: 'nuntiet Geminae ut res suas procuret, aedibus facessat.'

[3] Note the sequence of ideas in Cic. *Ad fam.* 8, 7, quoted below, p. 239, n. 1.

one marriage had been dissolved and a second contracted.[1] Some distinct act of divorce must have been required in proof of the validity of a second marriage, and the fact that there could be serious doubt in a given case whether the conduct of the parties had amounted to such act must have made the need of an unmistakable form clear to any legislator interested in domestic morality.

It is impossible to say in what measure the usual but optional forms had their origin in, or remained connected with, either of the two types of marriage, *manus* and free, rather than the other. But it is widely believed that in one particular at least the procedure of divorce where there was *manus* differed essentially from the dissolution of free marriage. That is in submission to a tribunal. Dionysius informs us that the husband was judge of his wife's delicts, but that her cognates were associated with him in judgement. For adultery or wine-drinking she might be condemned to death. Plutarch says that she might be divorced for adultery, poisoning, or counterfeiting of keys. From Valerius Maximus we have the statement that in 307–306 B.C. a certain L. Annius was expelled from the senate for repudiating his wife without summoning a council 'amicorum'.[2] Upon these scanty data has been erected the theory that divorce in the *manus* marriage could only be obtained by judgement in a domestic court.

[1] Girard, *Manuel*, p. 165, n. 5; Levy, op. cit., p. 16; Brini, *Matrimonio* 3, pp. 63–6. If one marriage legally cancelled another, it is difficult to see what it was that the praetor punished with infamy as bigamy. C. 5, 5, 2. Where one consort was a captive, Justinian allowed a second marriage to terminate the first, but with the forfeiture of *dos* and *donatio*. Nov. 22, c. 7.

[2] Dionysius, *Antiq.* 2, 25; Plutarch, *Romulus*, 22; Val. Max. 2, 9, 2.

This involves the assumptions that the divorce mentioned by Plutarch could and must be inflicted by the court mentioned by Dionysius, and that the *amicorum consilium* of Valerius Maximus is the same thing as the συγγενεῖς of Dionysius. It is exceedingly doubtful at the best. The intervention of the censors may mean no more than that it was looked upon as an improper and capricious act to turn out a wife without taking counsel of, or stating the grounds to, her relatives. There is a great gap between this and the conclusion that a rule of law existed calling for formal hearing and judgement in a court of the family.

To return now to the legend of Carvilius, it is obvious that a record which places the first Roman divorce about the year 230 B.C. is, to say the least of it, open to grave doubt. But the essential error may be in the date. Valerius Maximus places it as early as 604 B.C.[1] while Plutarch cites 524 B.C.[2] There is thus no contradiction in Valerius Maximus when he alludes to L. Annius's repudiation of his wife in 307–6 B.C.; and if we accept a date not later than the sixth century B.C. there is no difficulty in taking the Carvilian divorce as the earliest of which the Roman writers whose works have come down to us had themselves any record. Those modern commentators who accept 230 B.C. as the approximate year of the Carvilian divorce, while admitting earlier voluntary dissolution of marriage, avoid contradiction by interpretation. Thus Brini,[3] distinguishing between *repudium* in the *manus* marriage as the act whereby the husband juridically excluded the woman from his family and divorce in free marriage as the separation of consorts, not united in one family, by

[1] 2, 1, 4. [2] *Lycurgus and Numa*, 3. [3] *Matrimonio*, 2, pp. 106–9.

the will of either or both, makes the divorce of Carvilius the first affirmation of the dissolubility and mode of dissolution proper to marriage *sine manu*. Marquardt [1] regards it as the first case where a wife was repudiated without guilt and without judgement, under circumstances which did not justify the dotal forfeitures in which the condemned wife had usually been mulcted. From this time, he thinks, begins the use of 'tuas res tibi habeto'. The multitude of the assumptions which either of these explanations involves forces us back upon the simpler theory of uncertainty of date or, at the worst, of an inaccuracy in substance frequent enough in legends.[2]

II. Divorce in free marriage.

We have seen that no settled form was required for the dissolution of free marriage in the time of Cicero, and it was suggested that the controversy which he reports must have made the need of one obvious. According to the view generally held, though recently attacked by Levy in a study which must shortly receive our particular attention, the need was at last supplied by Augustus in the *lex Julia de Adulteriis*. In D. 24, 2, 9, we have the following excerpt from Paul's second book *de adulteriis*: 'Nullum divortium ratum est nisi septem civibus Romanis puberibus adhibitis praeter libertum ejus qui divortium faciet.' The most widely accepted interpretation was that notice of divorce must be served by a freedman of the divorcing consort on the other in the presence of seven adult Roman witnesses. This view of the matter suffered some partial attacks, as when Schlesinger [3] argued that 'praeter' meant 'excluding'

[1] *Privatleben*, p. 69, n. 2. [2] Girard, *Manuel*, p. 164. n. 6.

[3] Z. R. G. 5, 1866, pp. 193–218. The freedman of the divorcing consort, frequently used as *nuntius* in these matters, was not a good

rather than 'in addition to', and thus eliminated the freedman as an indispensable part of the apparatus; and when Schirmer[1] pointed out that informal separations continued to produce certain legal consequences. The thesis advanced by Levy in his book, *Der Hergang der römischen Ehescheidung*, 1925, would deprive it of almost the last shred of validity.

The obstacle in the way of taking D. 24, 2, 9 at its face value is, according to Levy, the multitude of texts which imply that divorces accomplished without the formalities ascribed to the *lex Julia* were legally valid. Thus the 'domo expulit' of D. 25, 2, 11, pr., the 'discidium' and the 'absente viro de domo ejus discesserit' of F. V. 106–7, and the 'dimittere uxorem' of *Coll.* 4, 3, 5, and 4, 12, 5 and 7,[2] all signify divorce, and Levy will not admit that these terms, specifying a part for the whole, connote formal notification with witnesses.[3] In his opinion, the declaration with seven witnesses was not a form of divorce at all but a method of expelling the woman *in manu mariti* from the family in order to avoid a prosecution for *lenocinium*. She might be divorced, but until *remancipata* was *filiae loco*, that is to say, *retenta*, not *dimissa*, leaving her former husband still liable under the *lex Julia* as *leno*. The form described by Paul in D. 24, 2, 9 was designed and included in the *lex* to enable the husband to terminate *manus* without co-operation on the woman's part. Without

witness '*in caput patroni*' (Paul, *Sent.* 1, 12, 4). This, as Levy says, op. cit., p. 45, is enough to explain his exclusion here.

[1] Z. R. G. 11, 1873, pp. 355–69. One instance is the refusal of succession *unde vir et uxor*—D. 38, 11, 1, 1.

[2] 'Dimittere' appears also in D. 4, 4, 37, 1. 48, 5, 25, 1; 34, 1. 23, 2, 44, 6 and 7, and elsewhere in the sense of breaking off a marriage.

[3] Op. cit., pp. 6 ff.

this she would have had to be present for remancipation to take place (Gaius, 1, 121), and a malicious adulteress could thus have exposed an already injured husband to all the rigors of the statute. The *libripens* and *mancipio accipiens*, having nothing to do in this form, were added as witnesses, an addition which explains the number seven. From this original purpose of avoiding a technical *lenocinium* the form was extended to cover all cases where it was desired to divorce and exclude from *manus* an absent wife.[1] Paul's text therefore originally ran something as follows: 'Uxorem coemptione in manum receptam neque remancipatam maritus ex lege non dimittit nisi septem civibus Romanis puberibus adhibitis praeter libertum ejus qui divortium faciet.'

Of the other texts mentioning statutory divorce formalities Levy disposes as follows: D. 48, 5, 44 (Gaius 3 ad XII Tab.)—'Si ex lege repudium missum non sit et idcirco mulier adhuc nupta esse videatur'—is a reference to the XII Tables, as the inscription indicates. Gaius is thinking of formalities such as those mentioned in Cicero, *Phil.* 2, 69, still standing as unrepealed prescriptions of the XII Tables, but in practice no longer compulsorily observed. The woman is still married, according to the letter of the XII Tables, but for practical purposes the marriage is dissolved.[2] In D. 24, 1, 35 (Ulpian 34 ad ed.)—'Si non secundum legitimam observationem divortium factum sit, donationes post tale divortium factae nullius momenti sunt, cum non videatur solutum matrimonium'—interpolation is revealed by the use of 'observatio' in the late imperial sense of legal rule. What Ulpian probably wrote was this: 'Si nuntio non misso uxor ex lege Julia de

[1] Op. cit., pp. 41–3.

[2] Op. cit., pp. 18–20.

adulteriis de manu dimissa sit, donationes inter virum et uxorem factae nullius momenti sunt, cum non videatur solutum matrimonium.'[1] D. 38, 11, 1, 1 (Ulpian 47 ad ed.), is a mass of interpolation recognizable by the defective syntax and clumsy style; and the last sentence, instead of 'item Julia de adulteriis, nisi certo modo divortium factum sit, pro infecto habet', should read 'Item mulier, quae coemptione in manum convenit, divortio facto bonorum possessionem petere non potest, quamvis non ex lege Julia de adulteriis dimissa sit'.[2]

Finally, Levy holds that Suetonius, *Augustus*, 34—'divortiis modum imposuit'—refers either to the prohibition of divorce for the freedwoman married to her patron, as enacted in the *lex Julia et Papia Poppaea* (D. 24, 2, 11, pr.), or possibly to dotal forfeitures, if these were regulated by a law of Augustus.[3]

There are objections both of substance and of form to this way of dealing with D. 24, 2, 9 and related texts. In the first place we may note that Levy's reconstruction makes the *lex Julia* require different courses of conduct of the husband according as his marriage is with or without *manus*. The husband in free marriage accomplishes his statutory duty by turning out the adulteress, whereas in case of *manus* he must undertake the further formality of notification with witnesses. The alleged reason is that after divorce the woman under *manus* is still *filiae loco* and cannot be regarded as *dimissa* until she has been legally cut off from the family. But this is scarcely to be taken for granted. Gaius, 1, 114–15b, warrants nothing more than the statement that the

[1] Op. cit., pp. 23–5 and 48.
[2] Op. cit., pp. 21–3 and 47–8.
[3] Op. cit., pp. 48–52.

woman *in manu* to a husband is *filiae loco*, while 1, 118, and 136 say in so many words that she alone is in that position. Levy's whole argument presupposes that the man is no longer a husband, and we may at least doubt whether her status differs from that of one *in manu* to an extraneous *coemptionator*. Certainly in the time of Gaius she has the power never granted a *filia*, and similar to that of the woman 'quae cum extraneo coemptionem fecerit', of compelling remancipation.[1]

Secondly, though there were still *manus* marriages in the time of Augustus[2] they must have been relatively rare. If we are to believe Tacitus, Tiberius was compelled to relieve *confarreatio* of civil *manus* in order to obtain candidates for the priesthood. If it had been common practice to marry with *manus* in ordinary life this could not have constituted a serious obstacle to *confarreatio*. The words used by the historian are especially significant: 'Sed lata lex, qua flaminica Dialis sacrorum causa in potestate viri, cetera promiscuo feminarum jure ageret.'[3] The probability is that *manus* was not a great deal more frequent in the reign of Tiberius's immediate predecessor, and it is a little surprising that detailed regulations regarding it should have found place in the statute law.

One difficulty of a more formal character in acceding to Levy's doctrine is the absence of any mention of this method of terminating *manus*. It is true that Gaius, 1, 137–137a, is defective in text, but enough has survived to make it unlikely that the jurist knew or spoke of any mode of voluntary liberation other than remancipation.

These objections might possibly have been waived were it not for a final and greater. Levy's conclusions

[1] G. 1, 137a. [2] See above, p. 84, n. 4. [3] *Ann.* 4, 16.

involve the assumption of interpolation in at least three texts of the Digest. There is nothing unusual in that; what is surprising is the nature of the retouches. We are asked to believe that these excerpts were amended in such a way as to deprive them of any truth, either for the time when they were written or for that in which they were altered. If Paul in D. 24, 2, 9 had in mind the *manus* marriage only the compilers might well have omitted the passage entirely, but they could have had no object in making it lay down a rule contrary to the law of their own day. For, according to Levy, no more in the reign of Justinian than in that of Augustus were divorces legally dependent upon notification with witnesses.

The texts attributing to the *lex Julia* these regulations regarding divorce are, in my view, genuine. When *expellere*, *discedere*, *dimittere* are used in contexts indicating that the marriage has been dissolved they convey in short stereotyped terminology that the steps laid down in the Augustan statute have been taken. The purpose of the provision was to secure proof that divorce had taken place, with a view to the application of the *lex* and, more generally, to the removal of such doubt as had existed in the case recorded by Cicero.[1] Accordingly the form itself was not sufficient: there must also be a serious intention to dissolve the marriage evidenced by separation for a reasonable time by

[1] *De Oratore*, 1, 40, 183–4. 1, 56, 238. In regard to the application of the statute itself, it may be recalled that (*a*) the husband could prosecute only after divorce; (*b*) no other person could prosecute before divorce, unless he had first succeeded in getting the husband convicted of *lenocinium*; (*c*) that the husband who had detected adultery in commission must divorce to avoid prosecution for *lenocinium*. See above, ch. 5, pp. 143–4.

restoration of dowry, remarriage, or other trustworthy *indicia*.[1] Under the last residuary heading would come, for example, the expulsion of the adulteress detected *in flagranti delicto*. As I understand the *lex Julia de Adulteriis*, the husband who in these circumstances called the necessary witnesses and ordered the woman out of his house or who, having turned her out, made a written or oral declaration of divorce, attested by the necessary witnesses, could then and only then institute a prosecution against her. Only then, moreover, was he safe against an accusation of *lenocinium*. In such a case no prolonged separation was needed to complete the divorce.

Of the texts cited as proving valid divorce without formality, F. V. 106–7 and D. 24, 1, 32, 13, lend themselves best to that interpretation. Being the strongest part of the opposing case, they merit special consideration here. Levy thinks the question in F. V. 106 to be whether a *discidium* amounts legally to a divorce, and holds that the mere departure of the woman *absente viro* in F. V. 107 terminates the marriage.[2] To my mind there is no suggestion of any difference between *divortium* and *discidium*,[3] the real query being whether a pact providing for *retentiones* regardless of fault is valid or not. Such an agreement, derogating from the common law, might have been looked upon as void because it is to the prejudice of the woman.[4] In 107 the question is whether the first marriage had or had not been terminated by a *repudium* followed shortly by a restoration of

[1] F. V. 107. D. 23, 2, 33. 23, 3, 31. 24, 1, 32, 12. 24, 1, 64. 24, 2, 3.

[2] Op. cit., pp. 7–8.

[3] The words are identical in meaning in D. 48, 5, 12, 13. 49, 15, 8. C. 5, 17, 8, 3.

[4] See above, pp. 199–200.

the woman to her place in the household. There is no emphasis on the mode of dissolution of the second union, and the 'de domo ejus discesserit' of the first sentence is equivalent to the 'divortit' of the second. This proves nothing more than that *discedere de domo* still means divorce in legal terminology, though the act of abandoning the matrimonial domicile must now be accompanied by the declaration or notification attested by seven witnesses. From D. 24, 1, 32, 13, it is argued that no formal act was required, otherwise there could never have been any question of long separation amounting to dissolution. The gift is invalid because the marriage of the parties survives separation, and Ulpian says that the marriage survives, not because there has been no duly accomplished divorce, but because there is still *maritalis affectio*. We are asked to infer that if this *affectio* had ceased the mere separation would have been transformed *ipso facto* into divorce, regardless of formal *repudium*. Brini[1] gets over this difficulty to his own satisfaction by assuming that the formality demanded by the *lex Julia* has been accomplished. There is, however, no *verum divortium* in spite of the separation. The forms are complete, but the serious intention needed to give them effect is lacking. The parties 'honorem invicem matrimonii habebant'. But the process of Ulpian's thought may have been simply this —Where there has been a gift between consorts and the donor dies before the recipient, the donor is not to be held to have repented because there was a quarrel, provided the quarrel was patched up. Nor is repentance necessarily to be inferred even from long separation. The marriage indeed subsists, therefore the gift is *prima*

[1] *Matrimonio*, 3, p. 113.

facie invalid; but where the donor has died without evidence, other than the separation, that he has repented his liberty, this vice is cured by the *senatus-consultum* of Severus and Caracalla. This view of the matter is considerably strengthened if we accept Levy's own opinion that 'non enim coitus affectio' is certainly, and 'quasi duraverint nuptiae' probably, a gloss.[1]

Levy[2] maintains that a written *repudium* was necessary after the enactment of Theodosius (Nov. Th. 12, pr. C. 5, 17, 8, pr.), apparently without perceiving the dilemma into which this leads him. Either he must concede that the 'expellere', 'discedere', and 'dimittere', which occur so often in the Digest, connote a group of acts, including the dispatch of a written *repudium*, or he must hold that the compilers repeatedly incorporated statements on this same point of law which were no longer accurate. If he chooses the first alternative he can scarcely object to allowing these type-words to signify a group of acts including notification with witnesses.

The written *repudium* is a commonplace in the East,[3] and if the excerpt of Papinian in D. 24, 2, 7 is uninterpolated,[4] must have been used in the West as well. The assertion that it became compulsory in Roman law depends upon the interpretation of Theod. Nov. 12, pr. (C. 5, 17, 8, pr.) in this sense. After a detailed examination of the relevant *papyri*, in which he sees proof of the development of the written document from an eviden-

[1] Op. cit., p. 11, notes 2 and 3. [2] Op. cit., pp. 125–8.

[3] See examples in Mitteis-Wilcken, *Papyruskunde*, 2, 2, pp. 329 et seq. Cf. Syro-Roman Law Book L. 92, P. 15 and 65.

[4] Levy argues that the written form was not only not compulsory in the classical law, but was not even used at Rome in that period. He regards this passage as heavily interpolated. Op. cit., pp. 60–2.

tiary to a dispositive function, Levy declares that one of the purposes of the Theodosian enactment was to make the Eastern usage general and compulsory.[1] In the East *repudium* and writing were so essentially associated that the expediency of specifying a written document did not occur to the draughtsman.

The point can hardly be taken as proved. The fact that the whole *Corpus Juris* does not provide in so many words a statement of the rule requiring writing must cause us to doubt. But it is particularly difficult for Levy to argue in favour of such a rule. He had already interpreted the constitution of Diocletian in C. 5, 17, 6, as meaning, not that the receipt or knowledge of a *libellus* is indifferent, but that no *libellus* is required.[2] Now if that is the meaning, and if writing was compulsory in the time of Justinian, this rescript should never have found its way in its present form into the Code.

Prima facie, C. 5, 17, 6 declares that where a *libellus* has been drawn up its receipt by the other party is not essential. The marriage is dissolved, given the other necessary conditions, even though the divorced consort remains in complete ignorance of the document. Until a case has been made out against this natural interpretation it must stand. The chief objection to the passage, which assuredly does not declare or presuppose the *libellus* compulsory, is that it appears to allow full effect to a declaration never communicated to the person addressed.[3] This is of little weight if my conception of the purpose of a formal *repudium* is correct. The *repudium* alone does not constitute divorce. Other

[1] Op. cit., pp. 113–28. [2] Op. cit., p. 65.
[3] Levy, op. cit., pp. 62–3 and 84–6.

conditions, already touched upon, are necessary; the oral or written declaration with witnesses is merely an indispensable element of publicity giving to the actual separation its legal significance. It is clear from the juristic and literary sources cited earlier in this chapter that, where one party was not present, notice of the declaration or the declaration itself was at least usually conveyed by 'nuntius'. The message, oral or written, might run 'tuas res tibi habeto', &c. When it was oral seven witnesses had to be called to witness the dispatch of the messenger. When it was written the document, known as the *libellus repudii*, may have borne the seals of seven witnesses and itself constituted the *repudium*. On the other hand the *libellus* may have been simply a record of a declaration of a divorce made before witnesses to satisfy the *lex Julia*, this record, or a copy of it, being usually conveyed to the divorced consort. That receipt of notice was essential is nowhere explicitly laid down, nor is there any text which makes such a rule a necessary inference. It is uncertain how far Gaius was speaking of usual and how far of compulsory practice in D. 24, 2, 2. The forms 'tuas res tibi habeto' and 'condicione tua non utor' were optional, and § 3 may mean no more than that, when the repudiated consort or betrothed was inaccessible, the 'renuntiatio' was commonly addressed to his or her *paterfamilias* or child *in potestate*. C. 5, 17, 2 refers only to betrothal, and even if it means, as it seems to mean, that an effective 'renuntiatio' could not be addressed to a person of unknown whereabouts, the rule is not necessarily the same for divorce. The argument *a fortiori* is indeed strong,[1] but not conclusive, particularly in face of D. 24, 2, 4, where

[1] It is used by Levy, op. cit., p. 86.

Ulpian says that a *furiosa* may be repudiated because she is in the same position legally as one who receives no notice ('ignorantis loco'). Levy regards the 'ignorantis' here as a reference to the position in D. 24, 2, 2, 3, and would have notice to the *paterfamilias* of *furiosa*, if she has one, compulsory; but the connexion is by no means self-evident.[1] The possibility of divorce from a consort who receives no information is again assumed in D. 23, 2, 45, 5, without any mention of notification to someone connected by *potestas*.

To sum up, the *lex Julia de Adulteriis* established a compulsory form of *repudium* with seven witnesses. This *repudium* might be either oral or written. Its purpose being simply to provide objective proof that divorce had taken place, the receipt of notification by the divorced party was not essential.

III. Capacity and Conditions.

Up to the time of the Antonines a *paterfamilias* could dissolve the marriage of his son, whether or not there was *manus*, or of his daughter not subject to *manus*, irrespective of their consent.[2]

As far as the free marriage is concerned, this results clearly from the texts in which the Antonine legislation on the subject is recorded. Paul in *Sent.* 5, 6, 15, and Ulpian in D. 43, 30, 1, 5, speak of fathers in general, not specifically of the wife's father: 'ne bene concordantia

[1] Cic. *Ad. Fam.* 8, 7. 'Paula Valeria, soror Triari, divortium sine causa, quo die vir e provincia venturus erat, fecit; nuptura est D. Bruto'—suggests divorce irrespective of knowledge on the husband's part. There is nothing to show that the *lex Julia de Adulteriis* changed the law in this respect.

[2] See above, pp. 122 et seq., for the woman. Where there was *manus* the only *paterfamilias* in question was of course the husband's, the wife having left her original family and placed herself beyond the reach of her father.

matrimonia jure patriae potestatis turbentur.' In D. 24, 1, 32, 19, Ulpian declares that the repudiation of a son's wife against the son's will is indeed without effect on the union, but only by reason of imperial decision.[1] Finally, the father's power survived, at least in the case of a daughter *in potestate*, where there was serious cause for separating the couple.[2] Nor is it certain that the action of a parent in repudiating an impotent son-in-law in accordance with C. 5, 17, 10 (A.D. 528) was subject to the wife's consent.

Manus enters very little into the calculations of the classical jurists, and we cannot therefore be certain that the Antonine prohibition was necessary to prevent a *paterfamilias* from dissolving a son's *manus* marriage. Brini[3] holds that when a father approved of his son's taking a woman in *manus* he lost the power of separating the couple. His authority is Dionysius, *Antiq.* 2, 27, supported by Plutarch, *Numa*, 17. But even if we admit an ancient rule of customary law prohibiting sale of a married son, it probably must be limited to real sale. Plutarch's reason—to wit, that Numa could not permit a woman who had married a free man to be compelled to cohabit with a slave—would scarcely preclude the fictitious sales of emancipation. I can see here no support for the view that *paterfamilias* could not break up the household by emancipating his *filius* or his daughter-in-law *neptis loco*. Moreover, divorce may early have become distinct from an emancipation

[1] He speaks of a rescript of Severus and Caracalla laying down this rule. Their rescript probably did not purport to be anything more than declaratory of the law as fixed by Pius or Marcus. For Solazzi's view as to the purport of the Antonine constitution, see above, p. 123, n. 1.

[2] C. 5, 17, 5.

[3] *Matrimonio*, 3, pp. 146 et seq.

which perhaps merely terminated *manus*, leaving a free marriage in its place. If so, a *repudium* itself would end the marriage relation, with emancipation to follow at leisure. Given the extreme powers of the *paterfamilias* of the early Republic, something more is necessary to establish so grave an exception to his right of determining the composition of his family. Still less can I accept Brini's opinion that *paterfamilias* could not dissolve the free marriage of a son by dispatching a *nuntius* to his daughter-in-law. That he had this power before the imperial changes mentioned above is indicated by Ulpian in D. 24, 1, 32, 19.[1]

If remancipation was ever an essential part of divorce in the *manus* marriage we may, with Brini,[2] question the capacity of a *filiusfamilias* to perform this legal act. At the very least the concurrence of his *paterfamilias*, who had *potestas* over the woman in the case, would be essential. But when divorce became separable from this emancipation there would seem to have been nothing to prevent a *filius* from proceeding independently with what long remained an informal transaction. Nor did the *lex Julia* confer upon it a character placing it beyond the capacity of one in *potestate*. Certainly his will was independent of paternal control in the dissolution of the free marriage. Terence shows a father vainly expostulating with a son who perseveres in his intention to divorce.[3] The legal texts afford no statement on the subject until Justinian's Code 5, 17, 12, which shows

[1] Brini, op. cit., 3, pp. 155–6, considers the rescript declaratory of ancient law. I consider it, as I have already said above, p. 240, n. 1, declaratory only of the new rule laid down by Pius or Marcus.

[2] Op. cit., p. 151.

[3] *Hecyra*, 3, 5, 32 and 43 and 51; 4, 3, 9 and 4, 4, 32 and 76 ff.

that the law before this enactment had permitted children of either sex to dissolve marriage, even against the will of their parents.[1]

Originally the wife could not of her own volition escape from *manus*.[2] In free marriage, on the other hand, the parties were on an equal footing, at all events by the end of the third century before Christ, and perhaps from the beginning.[2] This type of union, having become prevalent, ended by so far influencing the older and obsolescent form as to enable even the woman subject to *manus* to obtain her liberty.[3]

C. 5, 17, 12 and Nov. 22, c. 19 show that the *filia* as well as the *filius* could dissolve free marriage without reference to *paterfamilias*.[4] This might, however, be regarded as a liberty acquired very late in Roman law were it not that numerous texts of the Digest presuppose it. True, they do not state definitely that the liberty exists, but they frequently speak of a *divortium facere* on the part of *filiafamilias* in contexts practically excluding any parental concurrence.[5]

It was because this liberty of divorce was sometimes used by sons and daughters to defraud parents of their contingent rights in dowry derived from their estates, or to hasten the payment or restoration of

[1] Re-enacted in Nov. 22, c. 19, from which the following is taken: 'Neque enim rationi conveniat patrem quidem contra filii voluntatem matrimonium dissolvere non posse' (since Pius and Marcus)—'liberis vero . . . praeter patrum voluntatem matrimonium solvere et inde patres injuria adficere.' Voigt, *Lex Maenia*, § 16, pp. 70–1, attributes the son's liberty in this regard to his imaginary *lex Maenia de dote*.

[2] See texts cited above, p. 222. For an actual case of divorce by the woman see Cicero, *Ad. fam.* 8, 7, quoted above, p. 239, n. 1.

[3] Gaius, 1, 137a. [4] Contra Brini, *Matrimonio*, 3, pp. 152–4.

[5] See, for example, the texts cited by Levy, *Ehescheidung*, p. 18, n. 1. D. 24, 3, 34; 45; 66, 2. 23, 3, 24. 46, 3, 65. Ulpian, *Reg.* 6, 6.

donatio propter nuptias or dowry, that Justinian was constrained to restrict it in the enactments just cited. These made it impossible for children, whether *in potestate* or *sui juris*, to contrive, by collusive divorce subjecting one side or the other to the consequences of *culpa*, to obtain the immediate and exclusive disposition of property intended to form the permanent establishment of a new family. Any divorce subjecting a parent to loss or disbursement must have his or her consent on penalty of nullity.[1]

The *lex Julia de Maritandis Ordinibus* forbade a freedwoman to divorce her patron. The words of the *lex* are quoted by Ulpian as the following: 'divortii faciendi potestas libertae, quae nupta est patrono, ne esto.' We cannot, however, take this as one case where the wife in free marriage was deprived of the capacity to dissolve it. Ulpian goes on to point out that the *lex* is not *perfecta*, that the marriage is indeed terminated, but that the woman has no claim for restoration of dowry and no capacity to remarry unless the patron consents.[2]

IV. Restrictions on divorce.

The forfeitures of dowry and of *donatio propter nuptias* entailed by repudiating without cause or furnishing just occasion for divorce have already been incidentally touched upon.[3] We have now to examine in more detail the successive efforts made by the Christian Emperors to keep their subjects within the bonds of holy matrimony.

[1] Nov. 22, c. 19, A.D. 535 *initio*. The sanction under the constitution of A.D. 534 seems to have been liability on the part of the consort responsible for the collusive divorce to pay all the penalties involved. C. 5, 17, 12.

[2] D. 24, 2, 11, and D. 23, 2, 45. C. 5, 5, 1.

[3] See above, pp. 192–3, 201, 207.

Constantine opens the series of enactments with a prohibition of frivolous repudiations. A wife is not justified in divorcing a drunken, gambling, or flirtatious husband; only homicide, the preparation of poisons or the violation of sepulchres justifies such a step. The sanction is not nullity but, in addition to the loss of all dowry and *donatio ante nuptias*, deportation. A husband may not divorce for less than adultery, preparation of poison, or procuring. If he does, he loses *dos* and *donatio ante nuptias*. The constitution goes on to prohibit him from marrying again, but once again the sanction is not nullity but licence to the rejected wife to seize the dowry brought by her successor.[1]

This is followed in A.D. 421 by a law of Honorius, Theodosius, and Constantius,[2] which alters the punishment. Sentence of deportation is to be pronounced only on the woman who has divorced without cause. When she can prove 'morum vitia ac mediocres culpas' she escapes with loss of dowry and *donatio* and a prohibition of remarriage. Here a second marriage appears to be void, and the repudiated husband may prosecute as for adultery. Only serious crime so far justifies divorce as to give the woman full claim to dowry and *donatio* and a right to remarry after five years. A husband may divorce a wife guilty of serious crime, keeping dowry and *donatio* and having an immediate right to remarriage. If he repudiates for mere levity, he loses dowry and *donatio* and may not marry again within two years, while if he has no excuse at all, in addition to these material penalties, he is perpetually forbidden to take another wife.

C. 5, 17, 8 (Theodosius and Valentinian, A.D. 449)

[1] C. Th. 3, 16, 1, A.D. 331. [2] C. Th. 3, 16, 2. C. 9, 9, 34.

sets out in detail causes justifying divorce. Those common to both consorts are adultery, poisoning, treason, forgery, violation of sepulchres, church-theft, harbouring of brigands, kidnapping, and murderous designs against the other. Brigandage, cattle-thieving, wife-beating, intercourse with lewd women in the common home,[1] on the part of the husband; staying out all night, attending games or theatres prohibited by her husband, on the part of the wife, complete the list.[2] The extreme punishment for the wife who divorces without one of these reasons is now loss of dowry and *donatio* and a suspension of *conubium* for five years.[3] Forfeiture of *dos* and *donatio* is the only penalty mentioned for the husband, but a comparison of §§5 and 6 suggests that the two-year prohibition of remarriage of the previous constitution may have been left standing.

Divorce *bona gratia* or *communi consensu* was still unpenalized. A rescript of Anastasius, A.D. 497, points out that in such cases the woman may remarry after one year, the time required to avoid confusion of offspring.[4] No delay was imposed on the man, for there was no idea of punishing a separation desired by both parties.

In A.D. 528 Justinian adds impotence on the husband's part during a period of two years from the

[1] It is to be noted that such conduct on the part of a husband is not adultery unless the woman happens to be married, and not even then if she is a person of very low condition. See above, p. 141.

[2] The 'manus audaces sibi ingerentem' of h. t. 3 *in fine* is vague but appears to mean simply husband-beating, corresponding to the 'plagis illatis ab alterutro' of h. t. 6.

[3] The wife divorcing for good cause must wait a year before marrying again 'ne quis de prole dubitet'.

[4] C. 5, 17, 9.

marriage to the list of just causes. Here, however, the woman, while she recovers her dowry, must restore *donatio ante nuptias*.[1] C. 5, 17, 11 (A.D. 533) adds certain offences by the wife, such as abortion, wanton exposure of her person, and attempted bigamy. The same enactment provides penalties—both for frivolous divorce and for furnishing the occasion for just divorce—in cases where the absence of dowry makes a usual deterrent inoperative. The culpable consort is liable to the forfeiture of one-quarter of his or her property to a maximum value of 100 pounds of gold, this property, like any *lucrum dotis* or *donationis* in similar circumstances, to be disposed of freely by the other if there are no children, but to be for the offspring of the union if any.[2]

Chapters VIII to XIV of Justinian's one hundred and seventeenth Novel are devoted to a re-enactment, with some alterations, of the reasons and penalties for divorce. The important changes are as follows: There are to be no further divorces *communi consensu* except for the purpose of living a life of monastic chastity.[3] Where the consorts agree to separate for any other reason, *dos* and *donatio* are forfeited to the children or, failing children, to the *fiscus*.[4] The order of divorce and prosecution for adultery is reversed. The husband

[1] C. 5, 17, 10. The period is increased to three years in Nov. 22, c. 6 *in fine*.

[2] Slightly altered in Nov. 117, c. 5, which also deprives the husband of this compensation against the wife.

[3] Nov. 22, c. 5, had already recognized this desire for the chaste life as justifying the consort animated by it to dissolve a marriage. Any agreements made for gains to a consort surviving the other's death were then to take effect as if death had occurred.

[4] Other pains, *supplicia legitima*, are mentioned without further specification in this chapter 10.

who succeeds in getting a conviction against his wife or her paramour may then divorce her, keeping *dos* and *donatio*. In addition, the law now assigns to him all her property if there are children, and a portion of it equal to one-third of the dowry if there are not. Where he prosecutes and fails to prove her guilty she may divorce him with corresponding exactions from his property. Treason or misprision of treason: attempts or failure to reveal attempts on the life of a consort: the attempt to cause a wife to commit adultery: entertaining a mistress in the matrimonial domicile, or even in the same city if the offence is repeated: dining or bathing with other men, or staying away from home (otherwise than with parents) against a husband's will, and attending shows without his knowledge or against his command—these are the only crimes or wrongs, apart from adultery, henceforth justifying divorce.[1] Homicide, robbery, forgery, and the other common crimes specified in the earlier constitutions no longer serve this purpose. Wife-beating, which had been a good excuse for repudiation, is now punished merely by a fine equal to one-third the *donatio ante nuptias*, and this is remitted when the circumstances would also have excused divorce.[2] Apart from wrongs and offences, however, a marriage may yet sometimes be dissolved with impunity. As sufficient reasons, the Novel specifies long captivity, impotence on the husband's part, and the purpose of taking vows.[3]

These laws were not satisfactorily observed, and Justinian returns to the subject in Nov. 134, c. 11.

[1] Chs. 8–9.

[2] Ch. 14.

[3] Ch. 12. In case of captivity, the five-year delay of Nov. 22, c. 7, is presumably still required.

There it is laid down that persons divorcing without one of the reasons recognized in Nov. 117 shall be sent to a monastery for life, and that their property shall be divided in fixed proportions between the monastery and their descendants or ascendants, or failing descendants and ascendants shall go in entirety to the monastery.

CHAPTER X

REMARRIAGE

UNDER the Republic there was apparently nothing but sentiment to prevent a widower from proceeding at once to a second marriage. A widow, on the other hand, was under an obligation to mourn her dead husband, and if she made another match within ten months must expiate the sin by sacrifices.[1] The earliest sanction of this feminine duty was thus religious, but the praetor made it a matter of secular law by placing the offender—and, given guilty knowledge, her husband—on his list of persons debarred from appointing or being appointed *cognitores*—the so-called praetorian *infamia*.[2] Imperial legislation increased the time to the modern year of twelve months, and inflicted heavy pecuniary penalties for breaches of the law. Thus, in addition to *infamia* and the loss of rank, the woman who hastened into new marriage forfeited everything which had come to her from her first husband and lost the capacity of intestate succession to relatives outside the third degree.[3]

I. *Tempus lugendi.*

Where an ex-husband had been a traitor or alien enemy or had committed suicide *ex mala conscientia*, the old debt of mourning was not due. Nevertheless, here also the praetor demanded delay and specified the period which had established itself as the *tempus lugendi*. His motive in doing this was not to honour the memory of an unworthy spouse, but to prevent confusion of offspring.[4] As for delay after divorce, the earliest

II. *Perturbatio partus.*

[1] Plutarch, *Numa*, 12. [2] F. V. 320. Paul, *Sent.* 1, 21, 13. D. 3, 2, 11.
[3] C. 5, 9, 1 and 2, A.D. 380–1. [4] D. 3, 2, 11.

mention of any rule occurs in C. 5, 17, 8, 4b, A.D. 449, where the period, like the lengthened *tempus lugendi*, is set at one year.[1]

Neither of these obstacles affected males. Indeed, when Augustus passed his caducary laws, the widower must remarry at once to escape their provisions. But in view of her duty of mourning and the danger of a *perturbatio partus*, the widow had to be exempted from the immediate application of these laws. The *lex Julia* allowed women to remain single for one year after the death of a husband and for six months after divorce, while the *lex Papia* increased these periods to two years and eighteen months respectively.[2]

The tendency of the Christian Emperors was to regard second marriage as a vice. Even first marriage was no longer put at a premium, since Constantine had abolished the pains of celibacy.[3] But, at least where there were children, remarriage was surrounded by precautionary restrictions, and abstention from it was positively rewarded.[4] Thus, a constitution of A.D. 382 (C. 5, 9, 3) enacts that a woman who remarries, having children by a deceased husband, shall have only the usufruct of all property derived from the deceased. Her power to alienate is expressly withdrawn, and the whole property is to be preserved for the children. Where only a usufruct has been left her, she forfeits this

[1] Extended to all cases of divorce by C. 5, 17, 9, A.D. 497, and Nov. 22, c. 16, A.D. 535–6.

[2] Ulpian, *Reg.* 14. The fact that a divorced woman was allowed only six months to find another husband shows that the notion of *perturbatio partus* had, strangely enough, not yet been extended to the case of divorce.

[3] C. 8, 57, 1, A.D. 320. A concession to the Christian exaltation of the single state.

[4] Nov. 127, c. 3; above, p. 202, n. 4.

to the children of the first marriage.[1] In C. 5, 9, 5, A.D. 439, Theodosius and Valentinian extend the same rules to the marriage of widowed fathers. Leo and Anthemius follow in A.D. 472 with the decree that no widow or widower may give or devise more to a new consort than to any child of the former marriage.[2] The same restrictions are imposed by Justinian in A.D. 529 upon divorced consorts proceeding to a second marriage without regard to the question as to who was responsible for the divorce.[3]

In Novel 22 (A.D. 535–6) Justinian published a collated and revised statute regarding second marriages. There it is made clear that no penalties are incurred unless there are children by the first consort.[4] The woman of course has to wait her year, but the man may remarry at once. The woman with children who offends against the rule requiring a year's delay is subjected to increased penalties.[5] Throughout the Novel the second union is treated as a dishonour to the offspring of the first. In the main the provisions of the earlier legislation as to the disposition of property acquired by reason of the first marriage are maintained; but detailed regulations are added on many minor points, and the law of A.D. 392 regarding usufructs left to surviving consorts is repealed.[6] The limitation of the ex-consort's interest in dowry or *donatio propter nuptias* to a usufruct ceased to be peculiar to cases of remarriage, however, when in Novel 98 Justinian made this limitation the general rule.[7]

[1] C. 5, 10, 1, A.D. 392.
[2] C. 5, 9, 6.
[3] C. 5, 9, 9, 1. Nov. 22, c. 30.
[4] Chapters 22 and 23.
[5] Chapter 22.
[6] See above, pp. 250–1, and Novel 22, c. 32.
[7] See above, pp. 201–2.

INDEX

ABSENCE, effect of, on marriage, 215–17.
ACTIO
de moribus, 130–3, 150.
ex stipulatu, 182, 188, 190.
rei uxoriae, 148, 150–1, 182–8.
rerum amotarum, 196.
ADULTERY, 127–46.
AFFECTUS MARITALIS, 92, 95.
AGE
for betrothal, 2, 4.
for marriage, 51–3.
ALIMENTS, 127.
ARRA SPONSALICIA, 18–23.

BETROTHAL
age, 2, 4.
consent, 2–7.
denunciation, 17–18.
form, 2, 5, 6, 8–11, 13.
legal consequences, 8–17.
legal impediments, 7–8.
BIGAMY, 143.

CAPACITY OF MARRIED WOMAN, 108–17.
CAPTIVITY, effect of, on marriage, 212–15.
CAUTIO REI UXORIAE, 148–50, 151.
COEMPTIO, 78–85.
CONFARREATIO, 71–8.
CONUBIUM, 24–53, 96–105.
age and physical condition, 51–3.
nationality, 24–30.
office or employment, 39–47.
rank and status, 30–9.
relationship, 47–51.
CURATOR
marriage with ward, 44–7.
part in marriage, 66–7.
part in constitution of dowry, 168–70.

DEDUCTIO IN DOMUM, 92–4.
DEPORTATION, effect of, on marriage, 104–5, 211–12.
DIFFARREATIO, 78, n. 1, 222–3.
DISSOLUTION OF MARRIAGE
by modes other than divorce, 211–17.
by divorce, 218–48.
DIVORCE
in the manus marriage, 218–28.
in free marriage, 228–48.
capacity and conditions, 239–43.
restrictions on, 243–8.
DOMESTIC TRIBUNAL, 128–30, 133–5, 226–7.
DONATIO ANTE or PROPTER NUPTIAS, 205–10.
DOS
adventicia, 183–4.
aestimata, 172–6.
profecticia, 183–4.
recepticia, 182.
DOTIS
datio, 154–63.
dictio, 163–6.
promissio, 166–8.
DOWRY, 148–202.
administration, 172, 177, 179–81.
definition, 147.
modes of constitution, 154–68.
obligation to constitute, 152–4.
origin, 147–50.
ownership, 177–81.
restitution, 182–202.

EDICTUM DE ALTERUTRO, 188–90.

GIFTS
between husband and wife, 92–3, 114–17.
between sponsus and sponsa, 16, 18–23.

INSTRUMENTA DOTALIA, 94–6.

JUDICIUM
domesticum, 128–30, 133–5.
de moribus, 130–3.
JUS NECANDI, 127–8, 135–9.

LEGATUM DOTIS, 156–8.
LEGITIMATION, 95.
LENOCINIUM, 142–3.
LEX AELIA SENTIA, 100–1.
LEX CANULEIA, 30, 97.
LEX JULIA DE ADULTERIIS, 133–5.
LEX JULIA DE FUNDO DOTALI, 180–1.
LEX JULIA DE MARITANDIS ORDINIBUS, 31–9.
LEX JULIA ET PAPIA POPPAEA, 112, 119–21.
LEX MINICIA, 98, 100.
LUCRUM DOTIS, 200–2.

MANUS, 68, 71–90, 108–12.
MARRIAGE
  capacity and conditions, 25–67.
  effects, 107–21.
  forms, 68–106.
  free, 90–6.
MATRIMONIAL OFFENCES, 127–46.
MATRIMONIUM
  juris gentium, 88, 96–106.
  justum and injustum, 102–3, 139.
  non legitimum, 103.

OFFICIALS, marriage of, 42–4.

PACTA DOTALIA, 198–200.
PARAPHERNA, 202–4.
PATERFAMILIAS
  action for recovery of dowry, 183–6.
  part in betrothal, 1–6.
  part in marriage, 57–66, 81–3.
  part in divorce, 122–5.
PERMUTATIO DOTIS, 176–7.
PERTURBATIO PARTUS, 249–50.
POSTLIMINIUM, 213–15.
PRAELEGATUM DOTIS, 188–90.
PRIVILEGIUM EXIGENDI, 190–1.
PUBERTY, 51–2.

RELATIONSHIP, prohibited degrees of, 47–51.
REMARRIAGE, 249–51.
RETENTIO
  propter impensas, 194–5.
  propter liberos, 192–3.
  propter mores, 193.
  propter res amotas, 195–6.
  propter res donatas, 195.
REVERENTIA, 125–6.

SALE AND MARRIAGE, 1, 69, 78–83.
SOLDIERS, marriage of, 39–42.
STUPRUM, 141–6.
SUCCESSION
  between husband and wife, 117–21.
  between mother and children, 120.

TEMPUS LUGENDI, 249.
TUTOR
  marriage with ward, 44–7.
  part in betrothal, 5–7.
  part in marriage, 6, 60–2, 66–7, 80–3.
  part in constitution of dowry, 168–70.

USUS, 85–90.